IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
AUG 12 1974
MICHAEL RODAK, JR., CLERK

No. 73-848

JACK A. FUSARI,
Commissioner of Labor of the State of Connecticut,
Administrator, Unemployment Compensation Act,

Appellant,

v.

LARRY STEINBERG, CECIL PASKEWITZ,
DELIA TRIANA and JUAN MIRANDA,

Appellees.

ON APPEAL FROM THE THREE-JUDGE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLEES' BRIEF

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Appellees.

ON APPEAL FROM THE THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPELLEES' BRIEF

QUESTIONS PRESENTED

1. Whether Connecticut's "seated interview" procedure utilized for the termination of unemployment compensation benefits which provides neither adequate notice nor an opportunity for an adversarial prior hearing violates the Due Process Clause of the Fourteenth Amendment?

2. Whether the Connecticut "seated interview" procedure which terminates unemployment compensation benefits without a prior hearing violates the "when due" and "fair hearing" provisions of Section 303(a) of the Social Security Act?

STATEMENT OF THE CASE

This is an appeal from a plaintiffs' class action suit in which a Three-Judge District Court unanimously held unconstitutional the policies and practices of the appellant Administrator of the Connecticut Unemployment Compensation Act, which permitted him to terminate or suspend Unemployment Compensation benefits of persons already determined entitled, without meeting minimum due process standards.[1]

A review of the pertinent scheme of Unemployment Compensation is necessary for a full understanding of the issues presented in this appeal.

Unemployment insurance benefits in Connecticut are paid out of a trust fund maintained by the contributions of in-state employers, including interest and penalties.[2] So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to §302 of

[1] Although the relevant factual background to this case may be complex, it is also undisputed and has been the subject of a lengthy stipulation as contained in the Single Appendix, *See,* A. 35a-44a.

[2] Conn. Gen. Stat. §§31-261 through 31-271 deal with the creation and administration of the Unemployment Compensation trust fund, including collection of employers' contributions.

the Social Security Act, 42 U.S.C. §502. The Social Security Act requires, *inter alia,* that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. §503(a)(1). And, that state law include a provision for: "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. §503(a)(3). In Connecticut, a claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim in accordance with Conn. Gen. Stat. §31–230. The state system of determining that initial entitlement is not under attack here.

Instead, the basic issue in this case is the fate of a person who has been found entitled to Connecticut Unemployment Compensation benefits when a question arises as to that person's *continued eligibility* for those benefits.[3] According to Connecticut Unemployment Compensation Department Policy, a person may be disqualified for benefits after a "seated interview" which takes place without notice or representation. According to the Department, the paramount reasons for discontinuing eligibility are a Department finding that a claimant has not been "available for work" or has not made "reasonable efforts to find work" in accordance with §31-235(2) of the Connecticut General Statutes.[4] These reasons generally account for between

[3] The statutory standards for eligibility are set out in Conn. Gen. Stat. §31-235. J.S.A. 26A. The reasons for the disqualification of a claimant appear in Conn. Gen. Stat. §31-236. *Id.*

[4] J.S.A. 26A.

60 and 70 percent of the denial of benefits resulting from a "seated interview."[5]

[5]The Appellant's Brief in Opposition to Appellees' Motion to Affirm at 2, stating that the Three-Judge District Court ignored certain statements of the defendant, falls considerably short of reflecting all the pertinent facts with respect to these figures on the denial of benefits. At trial, parties stipulated that:

> The most common reason for denying benefits to a claimant who has been initially determined eligible to receive benefits is an alleged failure to comply with the "reasonable effort" and "able and available" section of Connecticut General Statutes. Section 31-235(2). These reasons generally account for between 60 and 70 percent of the denial of benefits resulting from "seated interviews" . . . . (Stip. to Facts, para. 14) (A. 39a).

In its opinion, the District Court stated "[A]t the hearing before this court, the defendant stated that this figure [60 to 70 percent] was in error, being based in part upon original denials of initiating claims. Defendant was unable, however, to provide us with a more accurate figure." (J.S.A. 3A.) *Steinberg v. Fusari*, 364 F.Supp. 922, 925 n. 7 (D.Conn., 1973).

At trial the Appellant was of the opinion that certain statistics were not available. However, Theodore W. Hatcher, the Director of Unemployment Compensation for the State of Connecticut, testified on behalf of the Appellant as follows:

> • • • •
>
> JUDGE NEWMAN: Do you have any basis for estimating what portion of all the denials that the plaintiffs are talking about [60 to 70 percent] are the ones you were talking about?
>
> • • • •
>
> THE WITNESS: It's very difficult for me to estimate however, I can say it includes cases where people are ill and come in seeking benefits and not meeting the eligibility requirements. They may have injuries and other things that do not qualify them under the benefit. They are a small percentage, I would say, of the total number of cases, but I can't give you an estimate.
>
> • • • •
>
> JUDGE BLUMENFELD: What about the other class where they have certain standards of their own as to where they are going to work and what kind of work they are going to do?
>
> • • • •
>
> THE WITNESS: This is also a small percentage.

(A. 213a-214a).

The Department defines "available for work" and "reasonable efforts" for continued eligibility as follows (A. 250a):

> "AVAILABLE FOR WORK." You must be ready, willing and able to take any suitable job on a full-time basis.
>
> • • • •
>
> REASONABLE EFFORTS TO FIND WORK." Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.[6]

After the determination of initial entitlement is made, the claimant is instructed to report bi-weekly to his local unemployment office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation," (U.C.–46), upon which he declares under oath his availability for work and his "reasonable efforts" to find work. The claimant also fills out a "Continued Claim Work Effort Information Form,"(U.C.–45)[7] on which he lists the dates and places he has gone seeking employment. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department.[8]

[6]Unemployment Compensation Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law," Conn. Dept. of Labor (Oct. 1, 1971) at 21. Connecticut, unlike many other states, does not have a manual of policies and procedures. Instead, policy is defined in a loose collection of Department memoranda.

[7]Reproduced at A. 121a, with corresponding Department memo at A. 122a.

[8]The Connecticut State Labor Department contains an Employment Security Division, Conn. Gen. Stat. §31-237(a), subject to the supervision of the Labor Commissioner as Administrator, *see* §31-222(a). Within this division, there are two departments, the State Employment Service Department, and the Unemployment Compensation Department. §31-237(a). It is with the latter that the claimant chiefly deals.

If no questions arise, the claimant is routinely given his benefit checks for the two-week period at issue.

When an issue arises as to the claimant's continued eligibility, the Department's procedure is relatively simple. The Department employee at the head of the claims lines looks at the U.C.-45 and U.C.-46 forms and either issues a check or if an issue of possible disqualification arises, directs the claimant to another line for a "seated interview."

Upon reaching the head of this line, the claimant is interviewed by a claims examiner who ascertains from the claimant "facts" as to his possible disqualification. If the examiner decides that the claimant is eligible, the claimant is referred back to the claims line to pick up his checks. If, however, the claims examiner decides that the claimant has not met the statutory requirements, the claimant does not receive his benefit checks but is told he will later receive written notification of the Department's decision concerning his eligibility for the weeks in question. This notice is a letter stating the reason for the non-payment citing a statutory provision therefor, and informing the claimant of his right to appeal. These letters are sent out under the signature of the office manager.

Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the "fact finder" will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.[9]

[9]Subject to the statutory directive that coverage, eligibility and non-disqualification are to be *presumed* in doubtful cases. Conn. Gen. Stat. §31-274(c), J.S.A. 31A.

The Department deviates from its "seated interview" procedure in at least two instances both concerned with the issue of whether a claimant has refused a job offer. If an employee of the State Employment Service Department has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising the claimant of the reason for the hearing and of his right to bring counsel and witnesses. The claimant then has the right to confront the Department employee at this hearing. In the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer–one whose "merit rating"[10] account has been charged because of the termination of the claimant's employment–notice of a proposed hearing is sent both to the claimant and the employer and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact finder's determination that the claimant has not made reasonable efforts to find work, a pre-termination hearing is the exception, rather than the rule.[11]

[10]Conn. Gen. Stat. §31-226, J.S.A. 26A.

[11]Even though this seems to violate Department policy, as outlined in the Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Compensation Law" which states *inter alia:*

> PRE-DETERMINATION HEARINGS
>
> If a question arises about your eligibility for benefits, an informal pre-determination hearing will be scheduled at the office where you are filing claims. You will be notified in advance of the time, place and purpose of the hearing, and of any evidence, such as medical certificates, that may be required.
>
> You will have the right to bring witnesses if you wish to do so. If your former employer is involved, he will also be notified in advance of the hearing and will have the right to attend or furnish information by mail or telephone. The employer also has the right to representation.

Once the claimant receives written notice of the fact finder's decision, he may file an appeal. This appeal is heard by an Unemployment Compensation Commissioner (*see*, Conn. Gen. Stat. §§31-241 and 31-242), who determines the matter of eligibility *de novo*. Unless "good cause" is "shown", Conn. Gen. Stat. §31-241, benefits for the period at issue are not paid pending appeal. Thereafter, an appeal on the record lies to the Superior Court. *See*, Conn. Gen. Stat. §31-249.

No attack is made here upon the procedures employed in the eventual Commissioner's hearing.[12] However, of the 461 intra-state appeals disposed of in Connecticut during December, 1972, fully 414 took at least 101 days between the time the appeal was filed and the date that a final decision was reached. Put in percentage terms, this means that about 89.8 percent of all appeals took over 100 days to decide. And, the figures indicate that 61 percent of all appeals took over 125 days to dispose of, while 29.5 percent consumed over 150 days before the Commissioner's decision.[13] As the District Court concluded: "[F]igures from other months strongly suggest that the December figures are not unrepresentative", and that the average delay is well over 126 days. (Footnote omitted).[14]

[12]The sufficiency of the Commissioner's hearing system, however, is presently under attack in the District Court of Connecticut. *See, Kohlbeck v. Loughlin*, et. al., Civil Action No. H-74-151 (D. Conn.) filed May 13, 1974.

[13]These figures are derived from an exhibit prepared by the plaintiffs after a detailed examination of the Unemployment Compensation Commission records (Plaintiffs' Exhibit 32). *See*, A. 133a-132a; J.S.A. 18A, *Steinberg v. Fusari*, 364 F.Supp. 922, 934 n. 22, 23 (1973); *see also*, Stipulation As to Plaintiffs' Exhibits, A. 45a.

[14]*Steinberg v. Fusari*, 364 F.Supp. 922, 934, J.S.A. 18A.

The District Court also found that a significant number of claimant appeals from the seated interview decision result in reversals of the original decision.[15]

A review of the factual situations of three of the named appellees will serve to put the general background outlined above into a sharper perspective.[16]

[15]For example, the District Court found a reversal rate of 26.1 percent for the year July, 1971 to June, 1972; 26.0 percent for July, 1972 to October, 1972; and 19.4 percent from January, 1973 through March, 1973. *See, Steinberg v. Fusari*, 364 F.Supp. 922, 936-37 n. 28 (1973); J.S.A. 22A.

[16]The original complaint named as plaintiffs Larry Steinberg and Cecil Paskewitz and requested a class action. While this case was pending before the District Court, the defendant administrator changed his position with respect to Paskewitz and the class he represented.

Paskewitz had received weekly benefits from August, 1971 until February of 1972, covering a period of some 26 weeks. In February of 1972, Paskewitz applied for extended benefits under Conn. Gen. Stat. §31-232b *et seq.* The application was initially approved, but when Paskewitz went, on March 2, 1972, to the Enfield Office to collect his extended benefit checks, he was told that he was no longer eligible and would not receive further assistance because a mistake had been made in the computation of his "wage credits" for eligibility. His appeal of that decision has been heard by an Unemployment Commissioner; at the time this case was argued no decision had been forthcoming.

The defendant Administrator conceded that Paskewitz should have been given a hearing on the underlying issue, which involved a determination of whether he had compiled sufficient wage credits to have been initially eligible for benefits. The defendant has changed its policy so that future cases involving such entitlement determinations will be handled in the following manner. Claimants are to be notified of a hearing at a time and place certain, at which they may bring counsel and present evidence on the entitlement issue. Benefits will be paid to affected claimants until a written decision on the merits has been issued, following the noticed hearing. *See*, Letter from Attorney General to Three-Judge District Court, A. 147a and Proposed Consent Order, A. 149a; *Steinberg v. Fusari*, 364 F. Supp. 922, 926-27 n. 15, J.S.A. 5A-6A.

Larry Steinberg had filed a valid initiating claim for benefits in Willimantic on or about April 17, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Willimantic Unemployment Compensation Office for his bi-weekly visit, and to claim benefits for the weeks ending October 16 and 23, 1971. He was directed from the claims line to a "seated interview." After some discussion with a fact finder, Steinberg was told that he would not receive the two weekly checks at issue, for failure to use "sufficient efforts to obtain work."

A formal notice, citing the statutory requirements of Conn. Gen. Stat. §31-235(2) was received by Steinberg on November 1, 1971, disqualifying him from benefits retroactive to October 10. Steinberg filed an appeal to the Unemployment Compensation Commission on November 5; a hearing was held on January 13, 1972. On May 10, 1972, the Commissioner upheld the Departmental fact finder; Steinberg did not seek review in the courts.

Appellee Delia Triana is a married woman with a husband and four children.[17] She was laid off from her employment at General Electric Company in Bridgeport because of lack of work. (A. 135a.) She filed a valid initiating claim for Unemployment Compensation benefits on June 18, 1972, in Bridgeport, Connecticut, was determined eligible, and received weekly benefits through July 8, 1972.

On or about July 24th, Mrs. Triana reported to the Bridgeport Unemployment Compensation office to file for and receive her benefit checks for the weeks ending

[17]Connecticut does not participate in the Aid to Families with Dependent Children - Unemployed Parent Program (AFDC–UP). The AFDC–UP Program was established by §407 of the Social Security Act (42 U.S.C. §607), with participation by the states made optional. Connecticut has chosen not to participate in this program. *See*, Stipulation to Facts, A. 43a., para. 39.

July 15th and July 22nd. She submitted her U.C.-45 and U.C.-46 forms and was told she would have to have a seated interview to determine if she had made reasonable efforts to obtain work. At the interview, the claims examiner determined she had failed to make "reasonable efforts to obtain work." Mrs. Triana did not receive checks for the weeks ending July 15th and July 22nd, at that time. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the four-week period between July 29, 1972 and August 18, 1972 on the ground that she had failed to make "reasonable efforts to obtain work."

On or about July 27, 1972, the Department sent written notice to Mrs. Triana informing her that she was disqualified indefinitely[18] from July 9, 1972 because she failed to satisfy the "reasonable efforts to obtain work" section of Connecticut General Statutes, Section 31-235(2). On or about August 7th Mrs. Triana filed an appeal on the termination of her benefits. Because of a large backlog of pending appeals, totaling 6,100 statewide as of August 31, 1972, her appeal was not heard by an Unemployment Commissioner until October 27, 1972.

[18]The parties stipulated that:

> Defendant's written policy is that the claimant will remain eligible for subsequent time periods so long as he satisfies eligibility requirements for those periods. In actual practice, however, some claimants who were found ineligible for one claims period and who filed appeals to the Unemployment Compensation Commission were denied benefits for later periods on the grounds that "they have appeals pending," in violation of the department's written policy.
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> Stipulation to Facts, para. 15, A. 39a.

Thus, Mrs. Triana was one of the victims of this violation of policy.

On November 10, 1972, the Commissioner rendered his decision. The Commissioner's findings of fact included the finding that Mrs. Triana "was desperate for work and sought all types of work in the local labor market."[19] The Commissioner's decision was that Mrs. Triana was correctly denied benefits for the first two-weeks in question and was incorrectly declared ineligible for the four-weeks between July 29, 1972 and August 18, 1972 and that she was entitled to benefits for the latter period.

Appellee Juan Miranda is a married man with a wife and two children. He lost his employment in June 1972 because the Felix Brass Company of Bridgeport closed permanently. (A. 139a). He filed an initiating claim for Unemployment Compensation benefits on July 2, 1972 in Bridgeport, was determined eligible and received benefits through August 12, 1972. On August 30th, Mr. Miranda reported to the Bridgeport office to receive his benefit checks for the weeks ending August 19th and 26th, 1972. When he presented his U.C.-45 and U.C.-46 forms, he was referred to a seated interview where it was determined by a claims examiner that Mr. Miranda had failed to make "reasonable efforts to obtain work." Consequently, he did not receive his checks for the weeks ending August 19, and August 26, 1972.

Subsequently, Mr. Miranda received written notice that all Unemployment Compensation claims from August 13, 1972 onward were disapproved. Mr. Miranda appealed on September 13th and on October 23, 1972 the Commissioner rendered his decision and held that during all periods in question, Mr. Miranda had "demonstrated a sincere effort to seek employment

[19] *See,* Decision of Timothy J. Loughlin, Commissioner of Unemployment, para. 8, A. 28a-29a; Stipulation to Facts, para. 22, A. 40a.

within the meaning of the Unemployment Compensation Act," and therefore was eligible for benefits withheld for the eight-week period from August 13, 1972 to the date of the appeal hearing.[20]

Prior to their hearings before the Commissioner, both Miranda and Triana intervened in this action in the United States District Court, (A. 1a, 3a), challenging the termination or suspension of their unemployment compensation benefits without notice of a hearing in violation of the Fourteenth Amendment and §303 of the Social Security Act, 42 U.S.C. §503 *et seq.*

A Three-Judge District Court was convened on November 13, 1972[21] with a hearing on the merits held on May 14, 1973. On September 17, 1973, the District Court entered its Memorandum of Decision declaring this action to be a class action in accordance with Fed. R. Civ. Pro. 23(b)2 and unanimously holding that "the 'seated interview' system as currently used for termination or suspending the payment of unemployment compensation benefits does not provide minimal due process under the 14th Amendment to the Constitution." It enjoined ". . . the defendant Administrator . . . from administering Chapter 567, Conn. Gen. Stat.

[20] *See,* Decision of Peter J. Issogna, Commissioner of Unemployment, A. 30a-31a; Stipulation to Facts, para. 29, A. 41a.

[21] At the time the motion to convene a Three-Judge Court was under consideration, twelve additional plaintiffs sought to intervene. (A. 1a.) In the memorandum of decision dated November 13, 1973 (A. 3a) Judge Newman granted the motions of Triana and Miranda to intervene, noting that they were presently back on the unemployment rolls after the disposition of their appeals, and thus had a particular interest in the procedures that might be employed in any subsequent terminations of their benefits.

See, Goldberg v. Kelly, 397 U.S. 254, 256 (1970).

(§31-222 et. seq.) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing." *Steinberg v. Fusari*, 364 F.Supp. 922, 938 (D. Conn., 1973) J.S.A. 24A. The Court held that the "seated interview system" as currently used for terminating or suspending unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution. "Essentially," the Court held, "we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time." *Id.*

On September 25, 1973, the Appellant moved that the District Court stay the permanent injunction pending appeal to the Supreme Court, which motion was granted on October 3, 1973. (A. 275a.)

On March 21, 1974, the Appellees moved that the District Court restore the injunction, which motion was denied on April 19, 1974.

In its Opinion on the Merits, the District Court noted that the "seated interview" system does not provide sufficient due process because:

> . . . Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their argument or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory

> citation to a statutory section concerning disqualification.
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> * * * *
>
> Of course, formulation of an appropriate system is in the first instance the responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do. *Steinberg v. Fusari*, 364 F.Supp. 922, 936 (1973), J.S.A. 20A, 21-22A. (citation omitted) (footnote omitted).

SUMMARY OF ARGUMENT

1. Connecticut's "seated interview" procedure for terminating or suspending unemployment compensation benefits does not provide adequate due process of law.

In this case, the Appellant concedes that the elements of due process which must proceed th suspension or termination of unemployment Compensation benefits are: (1) advance notice, (2) an opportunity to present a case, (3) an opportunity to rebut evidence, (4) an opportunity to consult with counsel, and (5) receipt of reasons for the denial of the benefits.

To achieve this goal, the Appellant operates a "seated interview" system which basically requires a claimant to be taken from the claims window, where he is supposed to be given his benefit check at once, to a "seated interview" where he is questioned about his efforts to find work during the past week. This "seated interview" only occurs when the person at the claims window suspects that the claimant may not have made "reasonable efforts" to find work or was not "available" for work. When such question arises, the seated interview takes place immediately. The Appellant's system provides no appeal process. Instead the only appeal is through a separate appeal process. The record shows that this process entails an *average* delay of 126 days between filing an appeal and decision. Moreover, these decisions generally reverse those made at the seated interview between 19 and 26 percent of the time.

In *Bell v. Burson* this Court stated: "In reviewing state action in this area . . . we look to substance not to bare form to determine whether constitutional minimums have been honored." 402 U.S. 535, 541 (1971), quoting *Willner v. Committee on Character* 373 U.S. 96, 106-107 (1963) (concurring opinion). The District Court did exactly that, and after full consideration of the Appellant's arguments and a complete examination of the operation of the Appellant's seated interview system, the District Court concluded:

> [W]e still think it clear that the seated interview system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently, have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is

> presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.
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> Essentially, we find due process lacking because (a) a property interest has been denied, (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time. *Steinberg v. Fusari*, 364 F. Supp. 922, 935, 937-38 (D. Conn., 1973), J.S.A. 20A, 24A. (citation omitted) (footnote omitted).

Due process, by its very nature "... negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). However, the hearing required by the due process clause must occur "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and it must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Where as here an entitlement to unemployment benefits is involved, and where a termination of those benefits would as a practical matter impose recognizable hardship, this Court in considering the factors of: (1) the nature of the private interest at stake; (2) the asserted governmental interests involved; (3) whether the issue to be determined at the administrative proceeding involves the application of a broad "fault" standard: (4) the adequacy and the operation of the existing procedures; and (5) whether

those procedures provide for a full and immediate hearing before the final administrative order becomes effective, must conclude that the Appellant's existing system violates due process of law.

The District Court was correct in determining that there is a constitutionally sufficient property interest in the continued receipt of unemployment compensation benefits to invoke the due process requirement of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 576-79 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-603 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Moreover, notice and hearing is required *prior* to the termination of those benefits because the importance of the individual interest at stake clearly outweighs the governmental function involved.

Since a legitimate claim of entitlement is involved which has been terminated on a broad fault standard without adequate prior notice, and hearing for no overriding asserted governmental purpose, the Court must affirm the opinion of the District Court and require notice and hearing *prior* to the termination of unemployment compensation benefits. This is so because the "seated interview" system of termination of unemployment compensation was found by the District Court to often rest on incorrect or misleading factual premises or on the misapplication of rules or policies to the facts of particular cases. *Steinberg v. Fusari*, 364 F. Supp. 922, 935 (1973), J.S.A. 20A. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 257 (1970).

2. The summary suspension of unemployment compensation benefits violate the "when due" and "fair hearing" requirements of the Social Security Act.

Under Title III of the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers find re-employment, and (3) to maintain the purchasing power of the unemployed, thus stabilizing consumer demand. To achieve these objectives state unemployment compensation procedures must be designed to provide "early substitute compensation during unemployment." *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971). In order to assure that benefits are paid in a timely fashion, the Act provides that State unemployment procedures "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503 (a) (1). For benefits to be paid "when due":, they must not only commence promptly once an unemployed worker is determined eligible for a fixed number of weeks, *see Java, supra*, but must also be paid regularly throughout his fixed period of eligibility until such time as he has been properly found to be no longer eligible for them. Only a procedure that provides an opportunity for a prior evidentiary hearing before benefits are suspended insures unemployed workers the continuous payment of unemployment compensation "when due."

Connecticut's Unemployment Compensation system finds a claimant eligible for benefits for a fixed number of weeks. Once an entitlement to benefits by the claimant has been established and initial eligibility

determined, Conn. Gen. Stat. §31-235 (1)(2), benefits are now "due" the unemployed worker. Yet Connecticut's system of randomly checking "continued eligibility" for unemployment benefits by means of an informal "seated interview" often results in the abrupt suspension of those benefits. An appeal by the claimant brings no full evidentiary hearing on the issue of eligibility for an average period of well over 100 days. (J.S.A. 18A.) If the referee finds that the suspension was erroneous, as occurs in virtually 20% of the cases, the eligible unemployed worker receives his benefits retroactively in a lump sum. Since the average length of time an unemployed worker receives compensation is between 9 and 12 weeks, the 18 week delay waiting for the appeal, forces the claimant and his family to survive without "sustaining funds". *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1957) Connecticut's Administration of its unemployment program does not fulfill:

> [T]he Congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasable . . . [which] is what the unemployment insurance program was all about."
>
> *California Human Resources Department v. Java,* 402 U.S. 121, 135.

The Appellants argue (Brief of Appellant at page 34) that this Court is bound by its summary affirmance in *Torres v. New York State Department of Labor,* 405 U.S. 949, *rehearing denied,* 410 U.S. 971. But as Mr. Justice Rehnquist reminded just last Term that "summary affirmances . . . obviously are not of the same precedential value as would be an opinion treating

the question on the merits." *Edelman v. Jordan* ___ U.S. ___, 39 L. Ed 2d 662, 677 (1974). The lower court did agree for the reasons stated by the District Court in *Wheeler v. Vermont,* 335 F. Supp.856 (D. Vt., 1971) that benefits are "due" until a full evidentiary hearing is held, J.S.A. 13A, and that the Appellants "seated interview" system of terminating unemployment benefits violates § 303 (a) (1) and (a) (3) of the Social Security Act, but did not so rule because of a Circuit rule on summary affirmances. *Doe v. Hodgson,* 478 F. 2d 537, 539, *cert. den.,* 414 U.S. 1093 (1973).

The Social Security Act further requires that the Department provide a "fair hearing" to unemployed workers whose benefits it seeks to suspend. As the Congressional intent makes abundantly clear, the purpose of the unemployment compensation program is to provide immediate assistance on a continuing basis to the unemployed worker, without an on again – off again delivery of payments. Only a prior "fair hearing" insures the regular flow of benefits to eligible workers – which "is what the unemployment insurance program was all about." *Java, supra,* 402 U.S. at 135.

ARGUMENT

INTRODUCTION

Although not binding on this Court, the Appellant in his Brief on the Merits unquestionably concedes that the following are the requisite elements of due process which must precede the suspension or termination of Unemployment Compensation benefits: (1) advance notice, (2) an opportunity to present a case, (3) an

opportunity to rebut evidence, (4) an opportunity to consult with counsel, and (5) receipt of reasons for the denial of benefits. In fact, he devotes an entire argument to them. *See*, Brief of Appellant, at 16-21. Indeed, the Appellant's presentation of the first Question Presented simply asks this Court to determine:

> Whether the plaintiff's [sic] administrative hearing, employing a "seated interview" system, meets minimal due process requirements of the Fourteenth Amendment to the Constitution?
> Brief of the Appellant at 2.

The Appellant consistently maintains and attempts to strenuously argue the fairness of the *operation* of those *procedures* which allegedly provide the conceded elements of due process. For example, in the Statement of the Case, the Appellant maintains that: "This case involves the *adequacy of administrative procedures* used to determine weekly claims for Unemployment Compensation." *Id.*, at 3. In the Summary of Argument he states: "It is the adequacy of this hearing procedure [not whether some other procedure is required] which is at issue.[22] The Appellant devotes two seperate sub-arguments to this theme captioned respectively: "The Issue Is The Sufficiency Of The Hearing Itself, Not What Happens Subsequent To It," and, "The Appeal To An Unemployment Compensation Commission Is A Matter Separate And Apart From The Hearing." Brief of Appellant, at 32-33.

In *Bell v. Burson*, this Court stated: "In reviewing state action in this area . . .we look to substance not to

[22] *Id.*, at 8. The Appellant further states: "The correct characterization of the issue is whether the procedures used . . . meet due process requirements. *Id.*, at 14.

bare form to determine whether constitutional minimums have been honored." 402 U.S. 535, 541 (1971), quoting *Willner v. Committee on Character*, 373 U.S. 96, 106-107 (1963) (concurring opinion). The District Court did exactly that and after full consideration of the Appellant's arguments and of the voluminous evidence[23] in this case, which involved a complete examination of the Appellant's "seated interview" procedure on its face and as applied, the District Court concluded:

> [W]e still think it clear that the seated interview system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact finding examiner may go beyond the record of the "seated interview" in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.
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> Essentially, we find due process lacking because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable *de novo* until an unreasonable length of time. *Steinberg v. Fusari*, 364 F. Supp. 922, 935, 937-38 (D.Conn., 1973), J.S.A. 20A, 24A. (citation omitted)(footnote omitted).

[23] As transmitted to this Court the Record below is contained in five volumes.

We recognize that due process, by its very nature "... negates any concept of inflexible procedures universally applicable to every imaginative situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). However, it has been well established by this Court that the hearing required by the due process clause must occur "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and that it must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). Where an entitlement to government benefits is involved and where such denial would impose recognizable hardship, the Appellees suggest that as a framework for appropriate analysis of this type of case the Court must consider the following factors: (1) the nature of the private interest at stake; (2) the asserted governmental interests involved; (3) whether the issue to be determined at the administrative proceeding involves the application of a broad "fault" standard; (4) the adequacy and the operation of the existing procedures; and (5) whether those procedures provide for a full and immediate hearing before the final administrative order becomes effective.

If this Court determines that a legitimate claim of entitlement is involved which has been terminated on a broad fault standard without adequate prior notice and hearing for no overriding asserted governmental purpose, it must affirm the opinion of the District Court and require notice and hearing *prior* to the termination of unemployment compensation benefits. This is so because the "seated interview" system of termination of unemployment compensation was found by the District Court to often rest on incorrect or misleading factual

premises or on the misapplication of rules or policies to the facts of particular cases. *Steinberg v. Fusari*, 364 F.Supp. 922, 935 (1973), J.S.A. 20A. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 257 (1970).

In the next section, Appellees will show that the District Court was correct in determining that there is constitutionally sufficient property interest in the continued receipt of unemployment compensation benefits to invoke the due process requirement of the Fourteenth Amendment. *See, Board of Regents v. Roth*, 408 U.S. 564, 576-79 (1972); *Perry v. Sinderman*, 408 U.S. 593, 596-603 (1972); and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Further, Appellees will show that notice and hearing is required prior to the termination of those benefits because the importance of the individual interest at stake outweighs the governmental function involved. This process, of necessity, requires an examination of the sufficiency of the present procedures. *Bell v. Burson*, 402 U.S. 535, 539-540 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); and recognition of the inadequacies of the separate appeals process.

I.

PRIOR NOTICE AND AN EVIDENTIARY ADVERSARIAL PRE-TERMINATION HEARING ARE CONSTITUTIONALLY REQUIRED SINCE THE UNEMPLOYED WORKER'S INTEREST IN THE CONTINUED RECEIPT OF BENEFITS OUTWEIGHS THE GOVERNMENTAL INTERESTS INVOLVED.

A. Having Fully Satisfied The Statutory Conditions For Entitlement To Unemployment Compensation Benefits, Appellees Have Established A Property Interest In The Continued Receipt Of Benefits Which Cannot Be Terminated Without Notice And Some Form Of Prior Hearing.

The analytical framework to be utilized in determining an individual's right to the protection of the Due Process Clause of the Fourteenth Amendment was synthesized by this Court in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), as follows:

> To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement for those benefits. *See also, Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Wolff v. McDonnell*, ___ U.S. ___, 42 U.S.L.W. 5190, 5196 (1974).

In Connecticut the issue of "entitlement" is separate and distinct from the issue of "eligibility". In order for a claimant to be found initially *entitled* to unemployment compensation benefits he must satisfy certain statutory prerequisites. Conn. Gen. Stat., Section 31-241 requires that a claimant file a "valid initiating claim." Conn. Gen. Stat. Section 31-230 states that "an initiating claim shall be deemed valid if the claimant is unemployed and meets the requirements of subsections (1) and (3) of §31-235." Stipulation to Facts, para. 2, A. 36a. Those two requirements are, in short, that he has registered for work and that he has established adequate wage credits.[24] Upon satisfaction of these two requirements, the examiner shall promptly determine "the weekly amount of benefits payable and the maximum possible duration thereof." Conn. Gen. Stat. §31-241; Stipulation to Facts, paras. 2 and 4; A. 35a-36a.

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[24]Subsection (1) and (3) of Conn. Gen. Stat. §31-235 provide:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found that: (1) he has made claim for benefits in accordance with the provisions of Section 31-240 and has registered for work at the Public Employment Bureau or other agency designated by the Administrator within such time limits, with such frequency and in such manner as the Administrator may prescribe, provided failure to comply with this condition may be excused by the Administrator upon a showing of good cause thereof; . . . (3) he has been paid wages by an employer who was subject to the provisions of this chapter during the base period of his current benefit year in an amount at least equal to thirty times his benefit rate for total unemployment, some part of which amount has been paid or was earned in at least two different calendar quarters of such base period.

Stipulation to Facts, para. 2; A. 36a.

In the case at bar, each of the named Appellees were found by the lower court to have established an "entitlement" to unemployment compensation benefits. *Steinberg v. Fusari*, 364 F. Supp. 922, 934-935 (D. Conn., 1973); J.S.A. 19A. It was only thereafter that each was determined at a "seated interview" to be ineligible for unemployment compensation benefits as a result of their alleged failure to satisfy Conn. Gen. Stat., §31-235(2). *See*, J.S.A. at 26A.

In short, in Connecticut one has established a legitimate claim of entitlement to unemployment compensation benefits by being unemployed, registering for work, and establishing sufficient wage credits. *See*, A. 164a-165a. As to this statutory characterization of entitlement, the parties herein are in full agreement. Stipulation to Facts, paras. 2 and 4, A. 35a-36a.[25] It necessarily follows that the "nature of the interest at stake . . . is within the Fourteenth Amendment's protection of . . . property." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Appellant does not contest the requirement that once an entitlement to property exists it may not be terminated without any notice or hearing. Rather, the Appellant has maintained throughout the present litigation that once entitlement to unemployment compensation benefits has been established in accordance with state law, the claimant is accorded a statutory presumption in favor of "*coverage*, eligibility and nondisqualification in doubtful cases." Conn. Gen.

[25]The same was recently found to be true by this Court in *Dillard v. Virginia Industrial Commission*, __ U.S. __, 40 L.Ed. 2d 540, 544 (1974), a case involving the suspension or termination of workmen's compensation benefits.

Stat. §31-274(c) (emphasis added); J.S.A. 31A. *See*, Brief of Appellant, at 5, 18; A. 203a.

This instant case is, therefore, dramatically dissimilar from the situation in Board of Regents v. Roth, *supra*, in which neither "the terms of the respondent's appointment" nor "any statute or university rule or policy . . . secured his interest in re-employment or . . . created any legitimate claim to it." Roth, *supra*, 408 U.S., at 578 (footnote omitted). Having established an undisputed claim to entitlement, it is axiomatic that adequate notice and some type of prior hearing is required before the benefits may be properly discontinued, terminated or suspended.

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing. "Except for extraordinary situations where some valid governmental interest is at stake that justifies postponement of the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 119, 91 S.Ct. 780. "While [m]any controversies have raged about . . . the Due Process Clause, . . . it is fundamental that except in emergency situations [and this is not one] due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542, 29 L. Ed. 2d 90, 96, 91 S.Ct. 1586. *Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7 (1972).

Indeed, this was the precise holding of this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970) wherein the welfare recipient had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. "The recipients [in Goldberg] had

not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The controversy in the instant case, then, is grounded solely upon whether the Appellant's "seated interview", which is utilized only as to questions of eligibility[26] can be construed as a "hearing". And, if so, whether it is constitutionally sufficient in terms of the "weight" of the particular property interest in unemployment

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[26]In Department parlance, *entitlement* is referred to merely as "initial eligibility" and *eligibility*, in the Constitutional sense, is referred to as "continued eligibility."

With respect to the issue of entitlement, the Appellant conceded below that when disputes arise, the claimant is entitled to the protection of due process before the monetary entitlement is divested. In sharp contrast to his position with respect to questions of eligibility for a continued claims recipient, he has conceded that:

> While this is a relatively automatic determination which is based solely on whether or not the claimant has sufficient wage credits . . . we now recognize that redeterminations are sometimes necessary because of error or misinformation, and that due process would not be given such a claimant unless he were given a hearing.
> Letter from Attorney General to Three-Judge District Court, A. 147a.

Given this position with respect to the issue of monetary entitlement to unemployment compensation benefits and the full panoply of procedural protections proposed to be afforded a claimant in such a situation, *see*, Appellant's Proposed Consent Order, A. 149a, it is illogical and untenable for the Appellant to deny them where complex factual issues hinge on the admittedly "broad" eligibility standards contained in Conn. Gen. Stat. §31-235(2), J.S.A. 26A, *see*, A. 171a-172a, and where the application of this particular statutory subsection accounts for "between 60 and 70 percent of the denial of benefits resulting from 'seated interviews'." Stipulation to Facts, para. 14, A. 39a.

compensation benefits and the governmental interests involved. *See, e.g. Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Wolff v. McDonnell*, ___ U.S. ___, 42 U.S.L.W. 5190, 5197 (1974).

B. Under The Weighing Test The Appellees' Interest In The Continued Receipt Of Unemployment Compensation Benefits As Against The Department's Interest In Summary Adjudication Compels The Conclusion Reached By The District Court That The "Seated Interview" System Violates Due Process.

Having fully assessed the "nature" of the property interest at issue by examining the state statutory foundation upon which entitlement to unemployment compensation benefits is granted it is unquestioned that due process requires some notice and hearing prior to termination. The determination of the precise form of the hearing required by the Due Process Clause, however, is to be ascertained by applying a weighing test to the interests at stake. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

Though variously phrased, the weighing test was perhaps best stated by Mr. Justice Stewart, speaking for the majority, in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961):

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well

as of the private interest that has been affected by governmental action.

See also, Mitchell v. W.T. Grant Co., ___ U.S. ___, 40 L. Ed. 2d 406, 412 (1974); *id.*, at 423 (Powell, J., concurring); *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 41 (1974) (Powell, J. and Blackmun, J., concurring); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263-266 (1970).

Moreover, in assessing the nature and application of the Due Process Clause it is fundamental that "it is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). This principle becomes all the more paramount where, as here, the adequacy of the existing "seated interview" system for the termination of unemployment compensation benefits is squarely at issue. *See*, Brief of Appellant, Questions Presented, at 2.

1. The claimant's interest in the uninterrupted receipt of unemployment compensation benefits to which he is statutorily entitled is paramount.

The plurality opinion of this Court in *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15 (1974), after reviewing the precedential weight of prior decisions involving governmental benefits and important private interests[27], cautioned that:

[27] *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license and vehicle registration); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wages); and *Fuentes v. Shevin*, 407 U.S. 67 (1972) (consumer goods).

> These cases deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of "property" protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.[28] 40 L. Ed. 2d, at 33-34.

[28] This Court's holding in *Arnett v. Kennedy*, ___U.S.___, 40 L.Ed. 2d 15 (1974), that the government's interest in the maintenance of the efficiency and discipline of its own employees is vastly dissimilar to the Appellant's interests in the instant case. In *Arnett*, that governmental interest was found to outweigh those of the employee and the fact that the employee might, as a practical consequence of his discharge, be placed in a "brutal need" situation or undergo a "tremendous hardship" was found, in that situation, not sufficient to tip the balance. As Mr. Justice Powell pointed out in his concurring opinion in Arnett *supra*, 40 L.Ed. 2d at 42, this Court's opinion in *Goldberg* and the type of balancing of interests it represents had expressly distinguished the interest of the discharged government employee from that of a recipient of benefits which were intended to provide the "very means by which to live." *See, Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). However, in cases where this heavily weighted governmental interest is not present, Mr. Justice Powell has observed that this Court has found the nexus between the termination of a right and the consequences that could follow as a practical matter, would outweigh the asserted countervailing interests. As he recently stated:

> In addition, the Court recognized in *Sniadach* that prejudgment garnishment of wages could as a practical matter "impose tremendous hardship" and "drive a wage-earning family to the wall." 395 U.S., at 340, 341, 342 . . . By contrast, there is no basis for assuming that sequestration of a debtor's good would necessarily place him in such a "brutal need" situation.
>
> *Mitchell v. W. T. Grant Co.*, ___ U.S. ___, 40 L. Ed. 2d 406, 426-27 n. 3 (1974) (concurring opinion).

Certainly, this is true with respect to unemployment benefits, where Congress has mandated no "needs" test beyond the fact that the wage-earner is temporarily unemployed.

Clearly since no issue of the maintenance of government employee efficiency and discipline is presented by the case at bar, this Court's departure in Arnett, *supra*, from recent cases upholding an individual's interest in important property interests is not dispositive here.

The significance of unemployment compensation for the unemployed worker is two-fold: *viz.*, unemployment compensation involves many of the characteristics of public benefit programs as well as those of a private contractual wage substitute. The conclusion that the continued receipt of such benefits overrides the Department's interest in retention of its "seated interview" system is compelled not only from an analysis of the two-fold nature of the benefits, but also from scrutiny of other property interests, much less significant, whose proposed termination methods have been held to warrant more stringent procedural safeguards than the procedures challenged herein.

Like other states, Connecticut participates in the cooperative federal-state program of unemployment compensation established by Title III of the Social Security Act, 42 U.S.C. §501, *et. seq.* In this respect it is markedly similar to categorical state-federal welfare programs administered primarily by the states. As respects such public benefit programs enacted by Congress in 1935, this Court has consistently characterized the nature of the Social Security Act as a "scheme of cooperative federalism." *See, e.g., King v. Smith*, 392 U.S. 309, 316 (1968); *Jefferson v. Hackney*, 406 U.S. 535, 542 (1972); *Shea v. Vialpando*, ___ U.S. ___, 40 L. Ed. 2d 120, 125 (1974).[29] In addition, this Court

[29]Indeed only last Term, Mr. Justice Marshall joined by Mr. Justice Blackmun observed:

> The Social Security Act's categorical assistance programs . . . are fundamentally different from most federal legislation . . . [T]he Social Security Act does not impose federal standards and liability upon all who engage in certain regulated activities, including often-unwilling state agencies. Instead, the Act seeks to induce state participation in the federal welfare programs by offering federal matching funds in exchange for the State's voluntary assumption of the Act's requirements.
>
> *Edelman v. Jordan*, ___U.S.___, 39 L.Ed. 2d 662, 687 (1974) (dissenting opinion).

has repeatedly recognized that states which rely even partially on federal reimbursement for use in these social welfare programs must conform to the administration requirements of the Act. *See, e.g., Edelman v. Jordan*, ___ U.S. ___, 39 L. Ed. 2d 662 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). The same principle has been applied by this Court to states which, like Connecticut, have elected to administer programs under Title III of the Act which established and governs unemployment compensation insurance. *See, California Department of Human Resources v. Java*, 402 U.S. 121 (1971).

In construing the legislative underpinnings of Title III of the Social Security Act, as a means of defining the parameters of the "when due" provision of the Act, 42 U.S.C. §503(a)(1), this Court determined "that the unemployment compensation insurance program was not based on *need* in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago." *California Department of Human Resources v. Java*, 402 U.S. 121, 130 (1971) (emphasis added). In this crucial respect, then, unemployment compensation exhibits certain characteristics of a private contractual agreement. To the Congress that created it, unemployment compensation came to an unemployed worker as a "matter of

right,"[30] in the sense of a "contractual right."[31] Further, unemployment benefits were legislatively created to be paid to unemployed workers during a specific period of time—the period in which they were involuntarily unemployed. Java, *supra*, 402 U.S., at 125-126.

In interpreting the importance of such benefits to the unemployed worker, however, this Court has recognized that although eligibility is not premised upon a "needs test" in the same sense as that for other benefit programs of the same Act, "a kind of 'need' is present . . . to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment." Java, *supra*, 402 U.S., at 130. Hence, the Court held that "the objective of Congress was to provide a *substitute* for *wages* lost during a period of unemployment not the fault of the employee."[32] To the extent that an unemployed worker is in "need" as a result of his status and has by prior employment established the

[30]79 Cong. Rec., at 5468 (1935), remarks of Representative Doughton, Chairman of the House Ways and Means Committee.

[31]Report of the Committee on Economic Security, Hearings on S. 1130 before Senate Finance Committee, 74th Cong., 1st Sess., at 1321-1322 (1935).

[32]In making this determination this Court relied heavily on the Report of the Committee on Economic Security submitted to the Congress by President Franklin Roosevelt in 1935 which:

> recommended a program of unemployment insurance compensation as a 'first line of defense . . . for [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means that . . . It will carry workers over most, if not all, periods of unemployment in normal times without resort to any other form of assistance.'
>
> *California Department of Human Resources v. Java*, 402 U.S. 121, 130-131 (1971) (footnote omitted).

right to unemployment compensation as "an earned money entitlement,"[33] the scope of his interest in continued receipt of such benefits is closely analogous to both the welfare recipient in *Goldbery v. Kelly*, 397 U.S. 254 (1970) and the wage-earner in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Since a kind of "need" is necessarily present in the situation of the unemployed worker found to be "entitled" to benefits, he is necessarily similarly situated to the welfare recipient found "entitled" to receive welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Since the process of summary termination "may deprive an *eligible* recipient of the very means by which to live while he waits," this Court proclaimed his right to an adversarial, evidentiary pretermination hearing. 397 U.S., at 264 (emphasis supplied); *see also, Wheeler v. Montgomery*, 397 U.S. 280, 282 (1970). Moreover, for those found entitled to receive unemployment compensation benefits, only their continued receipt "provides the means to obtain essential food, clothing, housing, and medical care."[34] Goldberg, *supra*,

[33]*See*, Report of the Senate Finance Committee on the Employment Security Amendments of 1970, S.Rep. No. 91-752, 91st Cong., 2nd Sess., at 24 (1971), and Report of the House Ways and Means Committee on the 1970 Employment Security Amendments, H.R. Rep. No. 612, 91st Cong., 1st Sess., at 19 (1969), both relating to unemployment compensation amendments to the Social Security Act.

[34]This is true in Connecticut which does not participate in the cooperative state-federal program of Aid to Families with Dependent Children – Unemployed Parents Program (AFDC–UP) and which does not provide town welfare assistance, including medical assistance, to otherwise indigent persons who have been found ineligible for unemployment compensation benefits. *Steinberg v. Fusari*, 364 F.Supp. 922, 934 (D.Conn., 1973) (J.S.A., 18A-19A); *Compare*, Goldberg, *supra*, 397 U.S., at 264 n. 11 and Conn. Gen. Stat. §§17-273b and 17-274 *with* Steinberg, *supra*, 364 F.Supp., at 934 n. 24. (J.S.A., 19A.)

397 U.S., at 264 (footnote omitted) (citation omitted).

Indeed, as noted by the Court below:

> Recent statistics suggest that the average unemployment compensation recipient is hardly well-off. In 1970, the average wage covered by unemployment insurance in the United States was $141.09; in Connecticut, it was $149.76. The average weekly benefit in that year in the United States was $50.31, or 35.7% of the average covered wage; in Connecticut, it was $60.26, or 40.2% of the wage. United States Department of Labor, Handbook of Unemployment Insurance Financial Data 1938-1970 at 139 (1971).
> *Steinberg v. Fusari*, 364 F.Supp. 922, 936 n. 26 (D.Conn., 1973), J.S.A. 21A (other citation omitted).

Further, the United States Solicitor General has expressed his opinion to this Court that the instant case is distinguishable from *Torres*. *See*, Brief for the United States In Opposition to Writ of Certiorari, in *Ellenmae Crow, et al., v. California Department of Human Resources Development, et al.*, No. 73-1015. The Solicitor has stated:

> The district court there recognized (364 F.Supp. at 931) that this Court's summary affirmance in *Torres* is entitled to full precedential weight. However, it distinguished *Torres* on two grounds – (1) the post-termination hearing provided by Connecticut in *Steinberg* was not held within a reasonable period of time – the Connecticut appeal procedures, like those of Indiana at issue in *Burney*, entailed a delay of several months rather than the few weeks involved here and in *Torres*; (2) the absence of a fall-back program of Aid for Dependent Children of Unemployed Parents in Connecticut, which would have provided welfare assistance pending appeal of the determination of unemployment compensation ineligibility, enhanced the *Steinberg* plaintiffs' interest in uninterrupted compensation.
> *Id.*, at 8-9.

It is reasonable to conclude then that the summary termination of such benefits like the partial garnishment of wages at issue in Sniadach, *supra*, may virtually lead to a family's inability to meet its essential recurring obligations such as rental payments. Such dire consequences as eviction and the inability to purchase a nutritionally adequate diet are nothing short of present "brutal need."

Hence, the withdrawal of even the "partial replacement of wages to the unemployed," not only violates the purpose of the Act; California Department of Human Resources v. Java, *supra*, 402 U.S., at 131, but also in view of Connecticut's lack of other potential resources, most assuredly renders their situation as "immediately desperate" as those of the welfare recipients in Goldberg, *supra*, 397 U.S., at 264.

Thus, although the resultant effects of the Appellant's "seated interview" system place the unemployment worker on the same precarious ledge as that shared by his counterpart in the welfare bureaucracy, as noted by the Court in Goldberg, *supra*, this was not the Congressional intent behind enactment of Title III of the Act. As this Court painstakingly emphasized in Java, *supra*, 402 U.S., at 131-132:

> Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" (footnote omitted), serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.

Because unemployed workers have been deemed by Congress to hold a more esteemed position than welfare recipients, this Court's previous pronouncement that "relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation," Goldberg, *supra*, 397 U.S., at 262, must be reaffirmed in the instant case.

Since unemployment compensation exhibits characteristics of both a contractual agreement, and a wage substitute, this Court's decision in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) is especially pertinent here. Like the claimant in the instant case, only 50 percent of the debtor's wages in *Sniadach* was subject to garnishment. Therein, the creditor's lawyer

> by [merely] serving the garnishee [employer] sets in motion the machinery whereby the wages are frozen. They may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard. . .
>
> Sniadach, *supra*, 395 U.S., at 338-339 (footnote omitted).

In the case of the unemployed worker, summary termination of benefits at a "seated interview" based upon a broad and subjective standard of "availability for work" and "reasonable efforts to find work" without adequate notice and any prior "hearing" in the constitutional sense violates the very notion of basic fairness. Like wages, the wage substitute of unemployment compensation is "a specialized type of property," Sniadach, *supra*, 395 U.S., at 340, the deprivation of which "may as a practical matter drive [an unemployed

worker and his] family to the wall." *Id.*, at 341-342 (footnote omitted).[35]

The fact that this Court has refused to sanction summary procedures for the taking of other property interests,[36] which although "dissimilar to one another," *Arnett v. Kennedy*, ___ U.S. ___, 40 L.Ed.2d 15, 33 (1974), are far less substantial than the benefits to which unemployed workers like the claimants have been found statutorily entitled and initially eligible, compels the conclusion that the decision of the Court below was clearly correct.

2. Retention of the "seated interview" system would vitiate the proper governmental function of promptly providing unemployment compensation benefits to unemployed workers.

As the Brief *Amici Curiae* for Elenmae Crow, et al.,[37] incisively points out, the Appellant's Brief fails to

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[35]Indeed, as a unanimous Court opined in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), the improper termination of unemployment compensation benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S., at 239. In the words of Mr. Justice Black, writing for the Court:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.

[36]See, *e.g.*, *Bell v. Burson*, 402 U.S. 535 (1971) (driver's licenses); *Boddie v. Connecticut*, 402 U.S. 371 (1971) (marriage dissolution); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (reputation).

[37]This Brief was also submitted on behalf of The American Federation of Labor and Congress of Industrial Organizations, and the United Steelworkers of America, AFL-CIO.

address the issue of the precise governmental function involved in the administration of the unemployment compensation program. Brief of *Amici Curiae* for Ellenmae Crow, et al., at 11-12.

Despite the Appellant's silence on this issue, this Court has already reviewed the relevant provisions and legitimate history of Title III of the Social Security Act and has determined that the proper governmental function of a participating state labor department such as that of Appellant is the payment of unemployment compensation benefits to eligible persons "at the earliest stage of unemployment that such payments [are] administratively feasible." *California Department of Human Resources v. Java*, 402 U.S. 121, 131, 133; 42 U.S.C. §503(a)(1). In so holding, Chief Justice Burger writing for a unanimous Court stated:

> Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the Congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.
>
> Java, *supra*, 402 U.S., at 133.

Despite this clear Congressional directive with the imprimatur of this Court the Appellant's administration of the unemployment compensation program in Connecticut is not neutral. Brief of Appellant, at 28 n.3. "Seated interviews" are conducted by claims examiners who are employees of the Appellant. Stipulation to Facts, para. 11, A. 38a. A claimant, like the Appellees herein, who has been found both statutorily entitled to unemployment compensation benefits and initially eligible reports bi-weekly to the local unemployment office "and is routinely given his benefit checks for the

two-week period unless upon submission of his form that he has been available for work and has made reasonable efforts to find work, the Department employee raises an issue of disqualification." Stipulation to Facts, paras. 8 and 9, A. 37a-38a. And if a question of possible disqualification arises the claimant *is not given his benefits checks*, but is rather referred for a "seated interview." Stipulation to Facts, para. 10, A. 38a (emphasis added).

It is clear from the foregoing review of the continued claims procedure that "seated interviews" are only arbitrarily scheduled for a claimant. The most common reason for the denial of unemployment benefits to those found initially eligible to receive them is alleged failure to comply with the "reasonable effort" and "able and available" requirements of Conn. Gen. Stat. §31-235(2). J.S.A. 26A, Stipulation to Facts, para. 14, A. 39a. Since between 60 and 70 percent of the denials result from "seated interviews" held for these reasons, *id.*, the vast majority of "seated interviews" involve the claimant in an adversary stance against employees of the Appellant. In this setting, "broad" standards are applied[38] and necessarily "subjective" judgments are made with respect to complex factual issues. In

[38]The Appellant's Booklet, "Your Rights and Responsibilities Under the Connecticut Unemployment Law," describes the requirements of Conn. Gen. Stat. §31-235(2) to the claimant in the following manner:

> AVAILABLE FOR WORK. You must be ready, willing and able to take any suitable job on a full-time basis.
>
> REASONABLE EFFORTS TO FIND WORK. Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work.
>
> Stipulation to Facts, para. 7, A. 37a, 250a.

And it is not clear that all claimants receive even these "guidelines." *See*, A. 94a.

instances where a continued claims claimant is subjected to a "seated interview" without any specific notice, if denied, his benefits are held by the Appellant as the administrator of the Unemployment Compensation Trust Fund. And as the Appellant has candidly admitted, the appeals procedure in Connecticut "could take years," Brief of Appellant, at 32, during which time a claimant is without this partial wage substitute. Hence, at the critical stage, in the "seated interview", the Appellant acts not in a manner to assist the claimant or even in a "neutral" position as he has steadfastly sought to convince this Court, but rather as an adversary seeking to preserve the fisc. The same state interest was rejected by this Court in *Goldberg v. Kelly*, 397 U.S. 254, 261, 266 (1970), and the persuasive reasoning of Mr. Justice Brennan indicates that had this Court reached the merits in the context of social security benefits, the same argument would have been rejected. *Wright v. Richardson*, 405 U.S. 208, 221-26 (1972) (dissenting opinion).

Moreover, the assertion of the same interest to avoid increased administrative costs necessitated by providing constitutionally sufficient prior hearings is not overriding. Goldberg v. Kelly, *supra*, 254 U.S., at 265-66; *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). As recognized by this Court, stated in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> The establishment of prompt efficacious procedures to achieve *legitimate state ends* is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.

Stanley, *supra*, at 561 (and cases cited in n. 8). (Emphasis added.) *See also*, Wright v. Richardson, *supra*, 405 U.S., at 223 (Brennen, J., dissenting.)

In the instant case, however, increased administrative expenses are not borne by the State of Connecticut, but rather by the Unemployment Compensation Trust Fund. *See*, Conn. Gen. Stat. §31-263.[39] And the Appellant is not without adequate means to recoup or set off erroneously paid compensation benefits to workers who survive their unemployment cycle and return to work,[40] unlike the situation in Goldberg, *supra*, where the recipients were assumed to be judgment proof. 397 U.S., at 266.

The interest of the employer is at most tangential since the requirement of the court below that benefits be continued during the pendency of a constitutionally sufficient hearing would be paid not from the general tax revenues of the state, but rather from the Unemployment Trust Fund, which is maintained by the state through employer contributions. Since this tax assessment is borne generally by all employers, at worst an employer would be subject to a minimal future increase in his tax rate. *Cf. National Labor Relations Bd. v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951). By contrast, the need of the unemployed worker to continued receipt of benefits, his exclusive source of income in many instances, is substantial and overrides the interests of both the state and the employers.

In short, the Appellant is mandated to provide compensation benefits to unemployed workers as soon as is administratively feasible. *California Department of*

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[39] 42 U.S.C. §502(a) provides for federal "payment to each state which has an unemployment compensation law [in such amounts as are] necessary for the proper administration of such law." The federal government is not harmed because it pays these amounts from a tax on employers.

[40] Indeed, the record evidence indicates that the recovery rate in Connecticut exceeds 50 percent. A. 201a-203a.

Human Resources v. Java, 402 U.S. 121, 131, 133 (1971). Since both the need of the unemployed worker is substantial and the governmental function clearly established, the unarticulated interests of the state in administrative efficiency and the minimal financial interest of the employer are not compelling. What was stated in the context of the welfare recipient in *Goldberg* is equally true for the unemployed worker in the instant case.

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.
>
> 397 U.S., at 265.

Since the district court's decision that the Appellant's "seated interview" system misconceives the proper governmental function and deprives Appellees of their right to due process of law, we urge this Court to affirm its judgment.

II.

WHERE ISSUES TO BE DETERMINED AT AN ADMINISTRATIVE PROCEEDING ARE TO BE DECIDED ON A BROAD FAULT STANDARD, DUE PROCESS REQUIRES NOTICE AND HEARING BEFORE THE TERMINATION BECOMES EFFECTIVE.

The instant case presents another reason for requiring prior notice and hearing in addition to the fact that the governmental function involved does not outweigh the importance of the private interest affected.

As this Court has recently stated, "The risk of wrongful use of the procedure must also be judged in the context of the issues which are to be determined at that proceeding." *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974). As is shown in this section, the issues of "availability" for work or a claimant's "reasonable efforts" to obtain work are not ordinarily uncomplicated matters that lend themselves to documentary proof, but instead are decided on a "... broad 'fault' standard inherently subject to factual determinations and adversarial input." *Id.*, 40 L.Ed.2d 405, 419 (1974). The Court in *Mitchell* further cited *Vlandis v. Kline*, 412 U.S. 441, 446-47 (1973) and cases cited therein as support for this proposition.

It is precisely where the issues to be determined at the administrative proceeding involve a broad fault standard that this Court has consistently held that notice and hearing is required *before* the threatened termination becomes effective. Mitchell v. W.T. Grant Co., *supra*, at 419-420. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court required notice and hearing prior to the revocation of parole. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court required notice and hearing prior to denial of guardianship to an unwed father. In *Bell v. Burson*, 402 U.S. 535 (1971), this Court required notice and hearing prior to the revocation of driver's license. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), this Court required notice and hearing prior to "posting" the name of a person as a heavy drinker. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court required notice and hearing prior to the termination of public assistance benefits. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court required notice and hearing prior to adoption by

another of a legitimate father's child. And, in *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), this Court required notice and hearing prior to an execution issuing against the property of a stockholder of a corporation.

In *Morrissey v. Brewer, supra*, the pivotal broad fault standard was whether or not the parolee had acted in violation of the conditions of his parole. The petitioner there was alleged to have, among other things, bought a car under an assumed name and operated it without permission, and to have failed to report his place of residence to the parole officer. The position of the second petitioner, Booker, was alleged to be substantially similar, but included the allegation that he had violated the employment condition of his parole by failing to keep himself gainfully employed. In an opinion by The Chief Justice, this Court set out six minimum requirements of due process with respect to the revocation hearing which included advance written notice, a right to present evidence, and to confront and cross-examine adverse witnesses. Even with respect to the preliminary hearing, the Court required advance notice of the alleged violations and opportunity to confront and cross-examine and to have the decision based solely on the information before the hearing officer. *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972). *Cf., Wolff v. McDonnell*, ___ U.S. ___, 42, U.S.L.W. 5190 (1974).

In Stanley v. Illinois, *supra*, state law required that upon the death of the mother, the State automatically take custody of all illegitimate children regardless of the particular fitness of the unmarried father to adequately care for the children. The pivotal broad fault standard on which this Court determined petitioner's right to

notice and prior hearing was whether Stanley himself was an "unsuitable and neglectful parent." *Stanley v. Illinois*, 405 U.S. 645, 654 (1970).

In Bell v. Burson, *supra*, Georgia Law provided that if an uninsured motorist was involved in an accident and could not post security, his driver's license must be suspended without any hearing on the question of fault or responsibility. The pivotal broad fault standard there was on the question of the petitioner's fault for the accident in question. This Court held that since the state purported to be concerned with fault, it could not suspend a license without a hearing on that crucial factor. As Mr. Justice Brennan stated for the Court, "due process requires that when a State seeks to terminate an interest such as that here involved, it must afford notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective." *Bell v. Burson*, 402 U.S. 535, 542 (1971).

In Wisconsin v. Constantineau, *supra*, the pivotal fault standard was whether the appellee was one who "by excessive drinking" produces described conditions or exhibits specified traits such as exposing himself or his family "to want or becoming dangerous to the peace of the community." This Court held that before the appellee had her name posted as such a person, she had to be given notice and hearing on this broad fault standard. *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

More particularly, in Goldberg v. Kelly, *supra*, this Court held that the New York welfare terminations were based on a broad fault standard predicated on whether or not the recipient was meeting certain conditions for continued eligibility. For example, one

recipient alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. Another was cut off for failure to accept counseling and rehabilitation for drug addiction although he maintained he did not use drugs. *Goldberg v. Kelly*, 397, U.S. 254, 256 n.2 (1970).

As the Court concluded:

> In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
> Id. 397 U.S. 267-68.

In Armstrong v. Manzo, *supra*, Texas law provided that an adoption would not be permitted without the written consent of the child's natural father, except in certain specified "circumstances". One such exceptional circumstance is if the father had not substantially contributed to the support of the child for two years, commensurate with his financial ability. In that event, in lieu of the father's consent, the law provided that written consent of a judge of the juvenile court may be accepted by the adoption court.

Preliminary to filing the adoption petition, Mrs. Manzo filed an affidavit in the juvenile court alleging in conclusory terms that the petitioner had failed to

contribute to the support of the child for a period of two years. A similar broad allegation was made in the adoption court. On this basis the adoption by Mrs. Manzo's new husband was granted. The natural father protested on the grounds that the adoption took place without notice or prior hearing as to him.

This Court held that since the adoption was predicated on the pivotal broad fault standard of the natural father's failure to contribute to the child's support commensurate with his financial ability, failure to give advance notice and hearing violated the most rudimentary demands of due process. *Armstrong v. Manzo*, 380 U.S. 545, 549 (1965).

In Coe v. Armour Fertilizer Works, *supra*, this Court held that before a party's property may be taken to pay an indebtedness on the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles to a day in court and a hearing upon the broad fault standard involving such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted and other defenses personal to himself. *Id.*, at 423. This Court observed that due process required that a person be given notice and hearing on all questions upon which his liability depends. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).[41]

Of course, we recognize that where executive discretion is unlimited, there is no need for a hearing, even though the standard is based on broad fault. Thus,

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[41] Appellees in no way denigrate the holding of *Fuentes v. Shevin*, 407 U.S. 67 (1972). Instead, they seek to illuminate that class of cases involving important interests terminated on a broad fault standard in which the principles of *Fuentes* must be given full force and effect.

where a statute provided that employment as a clerk was conditioned on maintaining the respect due to Courts of justice, *Ex parte Secombe*, 19 How. 9 (1856) no hearing is required. See also, *Crenshaw v. United States*, 134 U.S. 99 (1890) (Navy officer could be removed at will); *Parsons v. United States*, 167 U.S. 324 (1897) (district attorney could be terminated by the President at his pleasure); *Keim v. United States*, 177 U.S. 290 (1900) (post office clerks removable at pleasure); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

But, where executive discretion is not unbridled but is limited by Congress as in the instant case by Section 303 of the Social Security Act, 42 U.S.C. 503 et seq., notice and hearing are required. See e.g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). As this Court has observed: "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process". *Greene v. McElroy*, 360 U.S. 474, 507-508 (1959).

Thus, in determining whether a prior adversarial hearing is necessary before the deprivation of property becomes effective by final administrative order, the Court must first consider the nature of the governmental functions involved, the private interest affected and the precise character of the issue to be determined. Indeed, when assessing the possible issues for disqualification of unemployment compensation benefits, the conclusion that those issues involve a broad fault standard is compelled.

In Connecticut, as in many other states, one who has initially qualified for unemployment benefits may be suspended or terminated for fault for failure to make

"reasonable efforts" to find work or failure to be "available" for work. These two "failures" the District Court found, account for between 60 and 70 percent of all the denials of benefits as a result of a finding of fault at the seated interview.[42] In addition, the District Court found that other common reasons for the suspension of benefits include refusal of a "suitable" job offer, Conn. Gen. Stat. §§31-236 (1) and receipt of disqualifiying or deductible income.[43]

Indeed, the scope of the fault standard is revealed in the fact that termination of benefits often presents such questions as: Was the recipient available for work? Did he make an adequate effort to secure work? Did he adequately investigate job prospects? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider?[44] Did he place improper restrictions on his availability?[45] Has he taken any action that would

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[42] *See*, Stipulation to Facts, para. 14 (A. 39a); *Steinberg v. Fusari*, 364 F.Supp. 922, 925. J.S.A. 3A; Conn. Gen. Stat. §31-235 (2), J.S.A. 26A.

[43] Conn. Gen. Stat. §§31-236(4) and (7). *Steinberg v. Fusari*, 364 F.Supp. 922, 925 (D. Conn., 1973), J.S.A. 3A. *See also*, Stipulation to Facts, para. 14 (A. 39a.).

[44] Yet, in a Department memo dated May 19, 1953 (A. 123a.) the Department commented that it had observed "numerous local office decisions denying benefits for restricted availability which cannot be said to be supported by the facts appearing on the accompanying fact finding reports".

[45] The same memo continued:

> These are cases in which the findings of fact as prescribed in the fact finding report raise nothing more than a mere inference or an implication that the claimant is imposing a restriction on her availability—and it must be remembered that a decision based on inference or implication is as vulnerable as a decision based on presumption. A. 123a.

preclude an offer of employment? Did he make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suitable"? Did he receive sufficient information relative to the duties, hours of work, and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job marked in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home?

With respect to the termination of benefits, the District Court also found that of necessity, questions will often arise during the "seated interview" which involve third-party information, generally from a prospective employer whom the claimant has seen or talked to. If such questions arise, the District Court found that the fact finder will make an attempt to contact the third party while the claimant is present and will take into consideration the third party's information in reaching a decision. However, if the third party cannot be reached during the "seated interview", the claims examiner will proceed to make a determination as to whether the person will receive benefits for the two-week period in question.[46] If the

[46]Steinberg, *supra*. *See* Also, Stipulation to Facts, para. 12 (A. 38a).

examiner determines that the claimant has not made "reasonable efforts" to find work or has not been "available" for work the claimant is told that his benefits are suspended and that he will later receive written notification from the Department to that effect. This notification is a letter stating a reason for the suspension and informing the claimant of his right to appeal.[47]

Therefore, it is clear that the facts relevant to making a decision to suspend unemployment compensation benefits are not narrowly confined, but involve complex factual issues which do not lend themselves to documentary proof. Instead, they require the application of a ". . . broad fault standard inherently subject to factual determinations and adversarial input" which this Court has held ill-suited to summary determination. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974).

As this Court recognized in an unanimous opinion by The Chief Justice dealing with Unemployment Compensation: "Although the eligibility interview is informal and does not contemplate the taking of evidence in the traditional sense, it has adversary characteristics. . . ." *California Department of Human Resources v. Java*, 402 U.S. 121, 134 (1971).

The Appellant has readily conceded that the entire "seated interview" system is predicated on a broad fault standard and requires the resolution of complex factual issues. At trial, or through deposition, Theodore W. Hatcher, the Director of Unemployment Compensation

[47]The District Court found that the *average* delay between filing an appeal and the rendering of a decision was well over 126 days or 18 weeks. *Steinberg v. Fusari*, 364 F.Supp. 922, 934 n. 22 (D. Conn., 1973), J.S.A. 18A.

for the State of Connecticut, and Eleanor Smarz, manager of a District Office, both testified that the "seated interview" involves the determination of complex factual issues and the application of a broad statutory standard. A. 76a-80a, 84a-85a, 171a-172a.[48] The Appellant in his brief on the merits states that continued receipt of unemployment benefits is ". . . dependent on facts and behavior which vary from week to week." Brief for Appellant, at 21. With respect to two of the appellees, his Brief asserts ". . . Triana and Miranda were both denied benefits because they had failed to make reasonable efforts." *Id.*, at 25.

A more detailed description of the elements and operation of this broad fault standard based on an administrative determination of a claimant's failure to make "reasonable efforts" to find work or to be "available" for work is contained in the section that follows. However, with respect to the appellees Miranda and Triana, the record discloses that the fact finder's decision at the "seated interview" was reversed at the subsequent Commissioner's hearing. At the "seated interview," both Mrs. Triana and Mr. Miranda were

[48]In fact, the Connecticut Director of Unemployment Compensation testified as follows (A. 171a-172a):

> Q. Isn't it true that at the seated interviews, it very often involves the application of a very broad, in fact, vague standard such as available for work, reasonable efforts to make work, [refusal of a] job that was suitable as defined in the statute, . . . isn't the fact finder very often asked to apply those particular standards to the facts of the case before him?
>
> A. I must qualify part of my answer because you refer to vague statute.
>
> Q. I call it broad. I will withdraw the term "vague."
>
> A. Broad. They have to apply broad standards, yes.

disqualified for a total of 14 weeks on the issue of whether they were making "reasonable efforts" to find work, and suffered severe hardships as a result. At appeal hearings several months later, two separate Unemployment Compensation Commissioners reversed the local office decisions and held that 12 of the total 14 weeks had been improperly withheld from Mrs. Triana and Mr. Miranda. (Stipulation to Facts para. 22, 29; A. 40a-41a). The Commissioner's decision on Mrs. Triana found that she "was desperate for work [and] sought all types of work in the local labor market." A. 29a. With respect to Mr. Miranda, the Commissioner found that: "The Claimant, during the period of time in question, has demonstrated a sincere effort to seek employment within the meaning of the Unemployment Compensation Law. . .".[49]

The District Court clearly recognized the presence of this broad fault standard and admonished:

> When an administrator is making a subjective determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to *fairly* and *competently* present his side of the case, and meet any unfavorable evidence. This the present system does not do. *Steinberg v. Fusari*, 364 F.Supp. 922, 956 (1973), J.S.A. 21A-22A (footnote omitted) (emphasis added).

In *Bell v. Burson*, 402 U.S. 534, 539-542 (1971), after determining that Georgia's suspension of the petitioner's driver's license was predicated on a broad fault standard, this Court stated:

[49]*See*, Decision of Timothy J. Loughlin, Commissioner of Unemployment, para. 8. A. 29a-29a; Decision of Peter J. Issogna, Commissioner of Unemployment, A. 30a-31a.

> We turn then to the nature of the procedural due process which must be afforded the licensee on the question of his fault or liability for the accident. A procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case.
>
> * * *
>
> . . . [D]ue process requires that when a state seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective. (footnote omitted) (citations omitted). (emphasis in original).

Therefore, a prior adversarial hearing is necessary before unemployment compensation benefits are terminated because the issues to be determined involve a broad fault standard requiring the resolution of complex factual issues which are ill-suited for ex parte determination and unsuitable to be determined by simple documentary proof. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L.Ed.2d 406, 419 (1974).[50]

[50]Of course, Mitchell, *supra*, involved property rights and a possessory interest in certain consumer goods. The principles therein enunciated are amplified by the instant case which involves entitlement to important governmental benefits mandated by Congress.

III.

THE PRESENT SEATED INTERVIEW SYSTEM FOR SUSPENDING OR TERMINATING UNEMPLOYMENT COMPENSATION BENEFITS VIOLATES DUE PROCESS SINCE THAT PROCEDURE DOES NOT PROVIDE FOR A HEARING BEFORE THE TERMINATION BECOMES EFFECTIVE.

A. The Appellant's Procedures Do Not Provide For An Adequate Hearing Before the Administrative Order Terminating Unemployment Benefits Becomes Effective.

The appellant's major contention in this case is that the procedures employed in the seated interview system, *in and of themselves*, provide adequate due process to the claimant. He has repeatedly admonished this Court not to look at any separate appellate procedure beyond the seated interview system. In his Statement of the Case, the Appellant maintains that the *only* form of a *de novo* review or appeal from a fact finder's decision in a seated interview is to the Unemployment Compensation Commission, a separate commission which the Appellant maintains:

> . . . is a completely independent entity *separate* and apart from the defendant and the Employment Security Division, and pursuant to §31-244 C.G.S., it prescribes its *own* regulations for the presentation and hearing of appeals.[51]

[51]Brief of the Appellant, at 5-6.

The Appellant re-emphasizes this point in an entire separate argument in his Brief entitled "The Appeal to an Unemployment Compensation Commissioner is a Matter Separate and Apart From the Hearing [Seated Interview]." There, he maintains:

In the argument portion of his brief, the Appellant steadfastly maintains that the present procedures, *in and of themselves*, provide adequate due process. In fact, the Appellant has fashioned an entire argument on the premise that it was reversible error for the District Court even to look beyond the "seated interview" system and assess the adequacy of the appeal process–the only process by which a claimant may obtain a de novo review.

With more insight than he perceives, the Appellant states the point precisely:

> The defendant's seated interview concerning a claimant's own activity during a two week period just ended constitutes a fair opportunity to be heard at a meaningful time and in a meaningful manner. Subsequent appeal for further hearings cannot dilute the fairness of the initial procedure.
>
> * * * *
>
> . . . Since it is the decision on appeal, however, *a decision which could take years* when considering the claimant's remedy of appeal from the defendant to the Commissioner, then to the Superior Court, and finally to the State Supreme Court, with intervening requests for reconsideration, such complaint and holding must fail.

As stated previously, the Connecticut Unemployment Compensation Commission is an entity separate and apart from the defendant-administrator and the Employment Security Division of the Connecticut Labor Department; it prescribes its own regulations for the presentation and hearing of appeals . . . Yet, it is the 'delay' which occurs while claimants' appeals are pending before this body which the lower court found to be one of the reasons why due process was not afforded the plaintiffs. . . . Defendant submits that such 'delays' cannot be attributed to the defendant *since he has no authority in the handling of these appeals*, and his only participation in same is by way of his being a party to each appeal filed.

Id., at 33 (citation omitted) (emphasis added).

Brief of Appellant, at 32-33 (emphasis added).

In recently rejecting the rationale of such a self-contained system of due process Mr. Justice Powell commented:

> It seems to me that this approach is incompatible with the principles laid down in *Roth* and *Sindermann*. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily-created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace but by constitutional guarantee.
>
> *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 40 (1974) (opinion by Mr. Justice Powell, with whom Mr. Justice Blackmun joined, concurring in part and concurring in the result in part.)

Mr. Justice White also rejected the self-contained notion of due process in Arnett, *supra*, where he admonished:

> The rationale of the position quickly leads to the conclusion that . . . the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre-or post-termination.
>
> Arnett v. Kennedy, *supra*, 40 L. Ed. 2d, at 46. (Opinion of Mr. Justice White, concurring in part and dissenting in part).

Indeed, the Appellant's position in the instant case has been rejected by a majority of this Court. *Cf.* Arnett v. Kennedy, *supra*, 40 L. Ed. 2d, at 63 (opinion of Mr. Justice Marshall with whom Mr. Justice Douglas and Mr. Justice Brennan concur, dissenting).

In interpreting a long line of cases, this Court has recently observed that many of them do not speak to

the issue of the need for a pre-termination hearing where a full and immediate post-termination hearing is provided. *See, Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 40 L. Ed. 2d 406, 415-16 (1974) (and cases cited in n. 10 therein). In this case, through his own brief, Appellant clearly admits that under his statutory scheme no post-termination hearing of any kind is provided. Moreover, the separate appeal process when examined by the District Court was found defective since the administrative decision is not reviewable *de novo* until an unreasonable length of time. *Steinberg v. Fusari*, 364 F. Supp. 922, 937-938 (1973), J.S.A. 24A. We submit that the acceptance of Appellant's position on this point alone would compel this Court to affirm the opinion of the District Court because of the overwhelming defects in the operation of the existing "seated interview" system. However, an examination of the separate appeals system will compel the same result.

As this Court has observed, "[W]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity for ultimate judicial determination of liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931), quoted with approval in Mitchell v. W.T. Grant Co., *supra*, 40 L. Ed. 2d 406 at 416. In *Mitchell* the Court also noted, with respect to property rights in general, that "we have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.*, quoting *Ewing v. Mytinger and Casselberry*, 339 U.S. 594, 598 (1950). In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), however, it was said that a procedural rule that may satisfy due process for

attachment in general is not one that would "necessarily satisfy procedural due process in every case," nor one that "gives the necessary protection to all property in its modern forms," quoted in Mitchell, *supra*, 40 L. Ed. 2d, at 417. As the Court in *Sniadach* observed, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S., at 340. That unemployment compensation benefits also occupy a position as a specialized type of property need not be elaborated here. As this Court recognized in *Sniadach*, the seizure of an individual's wages could "as a practical matter drive a wage-earning family to the wall." Sniadach, *supra*, 395 U.S., at 341-42 (footnote omitted). The point here is that, as Mr. Justice White has accurately observed: "The impact of deprivation increases, of course, the longer the time period between the intial deprivation and the opportunity to have a full hearing." *Arnett v. Kennedy*, ___ U.S. ___, 40 L. Ed. 2d 15, 55 (1974). He further stated that:

> In Sniadach and Fuentes, there was no indication of the speed with which a court ruling on garnishment and possession would be rendered, and of course the ultimate issues on the merits in such cases must wait for a still later determination. In *Bell*, the issue of liability might not be determined until full trial proceedings in Court.
>
> Arnett v. Kennedy, *supra*, (opinion of Mr. Justice White, concurring in part and dissenting in part).

In the Connecticut scheme, the final administrative order terminating and suspending unemployment compensation benefits becomes effective immediately at the

seated interview and is later confirmed in writing.[52] Thereafter, the claimant is left to his own devices under a separate appeals system which the District Court found to entail an *average* delay of 126 days. Steinberg v. Fusari, *supra*, 934 F. Supp. 922, 934, J.S.A. 18A (emphasis added.)

As this Court has observed: "The formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the *nature of the subsequent proceedings.*" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (Harlan, J.) (emphasis added).

We turn then to consider the unreasonable time period between the initial deprivation and the opportunity for a full hearing.[53]

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[52] *See*, Stipulation to Facts, para 11., A. 38a, which recites:

> If, however, the claims examiner determines that he has not met the statutory requirements, the claimant does not receive his benefit checks and is told that he will receive written notification of the department's decision.

Cf. Ewing v. Mytinger and Casselberry, 339 U.S. 594, 598 (1950), cited with approval in *Mitchell v. W.T. Grant Co.*, __U.S.__, 40 L.Ed. 2d 406, 416 (1974), where the Court stated: "[W]e have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective."

[53] As has been pointed out previously, no attack in this litigation was made upon the procedures employed in the eventual Commissioner's hearing. However, the sufficiency of the system is presently under attack. *See, Kohlbeck v. Loughlin, et al.*, Civil Action No. H-74-151 (D. Conn., filed May 13, 1974). There, the plaintiffs alleged *inter alia* that the Commissioners' appeal hearings extend beyond issues involved in the Department's initial determination, there is no right to confront or examine pivotal adverse witnesses and that the Commissioners' decisions are based either on issues not made known to the claimant before the hearing and not made the subject of the actual hearing or solely on hearsay introduced by representatives

B. The Average Delay of Well Over 100 Days For a De Novo Review and Decision Is Not An Immediate Post Termiantion Hearing.

In *Torres v. New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), the court there found that the claimant's interests were measured by the possibility that he might have to live off his savings or welfare in the "few weeks" between termination and a full hearing. Those interests were found not to outweigh the governmental interest in accurate and unhurried determinations of eligibility, and the difficulties inherent in recouping mistaken payments. The factual situation of the Connecticut claimant in this regard is significantly different from that of the New Yorker to require a different result.

In *Torres* the record indicated that the average disputed compensation case took 45 days for determination. 321 F. Supp., at 439 (Lasker, J., dissenting). This period, then, is the "few weeks" during which the terminated New York claimant might have to rely upon savings or welfare, while awaiting his hearing on the merits of the termination issue. *Compare, Wheeler v. State of Vermont*, 335 F. Supp. 856, 861 (D. Vt. 1971) (three-judge court), where Judge Oakes viewed a five-week delay as "unreasonable."

It is abundantly clear that the relevant delays in Connecticut are far longer. The record indicates that of the 461 intrastate appeals disposed of in Connecticut during December of 1972, fully 414 took at least 101 days between the time an appeal was filed and the date

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of the Department. Thus, the contention that the Commissioners' system provides an adequate "fair hearing" is doubtful. Some aspects of this eventual Commissioners' hearing appear to have been changed by a recent statutory amendment. *See*, Conn. P.A. 74-339, effective July 1, 1974.

a final decision was reached. Put in percentage terms, this means that about 89.8% of all appeals took over 100 days to decide. And, the figures indicate that 61.4% of all appeals took over 125 days to dispose of, while 29.5% consumed over 150 days before the Commissioner's decision was rendered. Steinberg v. Fusari *supra*, 364 F. Supp. 922, 934:[54]

Thus, the opinion of the District Court observed:

> It may be one thing to find the claimant's due process claims insufficient in New York, where 45 days are consumed awaiting a decision in the average appeal, but it is quite another to do so in Connecticut, where the average delay is well over 126 days, or 18 weeks. And, while New York had Aid for Dependent Children programs available for those stuck by "brutal need" during the 45 day period, Connecticut with its average delay period of over 126 days, does not participate in the Aid for Dependent Children–Unemployed Parents Program.
>
> 364 F. Supp., at 934, J.S.A. 18A-19A. *See*, Stipulation to Facts, para. 39 (A. 43a).

[54] As the District Court stated:

> The above figures derive from an exhibit prepared by plaintiffs after detailed examination of Unemployment Compensation Commission records. Their accuracy is not challenged by the defendant Administrator. The figures cover the 461 intrastate appeals disposed of by written decision in December, 1972; interstate appeals, which involved obtaining work and wage records from the state of the claimant's prior residence, were not included as they generally involve even longer delays.

The aggregate figures are as follows:

Days Between Filing of Appeal and Commissioner's Decision	Number of Appeals In Category	Percentage of Total
0-30	1	.2%
31-45	2	.4%
46-75	9	2.0%
76-100	35	7.6%
101-125	131	28.4%
126-150	147	31.9%
Over 151	136	29.5%
	461	

Steinberg v. Fusari, 364 F.Supp. 922, 934 n. 22 (1973), J.S.A. 18A.

Even compared to objective criteria, Connecticut's separate appeals process does not provide for an "immediate" post-termination hearing. In fact, a comparison of Connecticut's delay period for deciding Unemployment Compensation appeals with the rest of the nation reveals its truly deplorable condition and negates any concept that this separate appeal procedure provides an immediate post-termination hearing. During the calendar year 1973, for example, Connecticut decided only 5.3 percent of its Unemployment Compensation appeals within thirty days, the lowest percentage in the nation. During the same period, Connecticut decided only 15.5 percent of the appeals within 45 days, the lowest percentage in the nation. In total, Connecticut decided only 31.4 percent of *all* appeals within 75 days from the date of filing, again the lowest percentage in the nation.[55] Thus, in

[55] *Unemployment Insurance Statistics*. "Table 17B-Appeals Decisions Under State Programs, Time Lapse Between Date of Filing Appeal and Date of Decision, January-December 1973," U.S. Department of Labor, Manpower Administration (April, 1974) (hereinafter U.I. Stat.)

Indeed, even compared to the national averages in the same table Connecticut's separate appeal process is wholly inadequate:

Connecticut in calendar year 1973 a full 68.6 percent of all appeals from the denial of Unemployment Compensation benefits to the separate appeals system took over 75 days to decide, during which time the benefits in question were held by the Appellant.

Percentage figures do not provide the full story since, taken alone, they do not adequately reflect the human element. In the month of January, 1973, the appeals of 506 individuals were decided of which 503 took over 75 days; in the month of February, 1973, the appeals of 528 individuals were decided of which 521 took over 75 days to decide; in March, 1973, the appeals of 685 individuals were decided, of which 676 took over 75 days to decide.[56]

	January - December, 1973 Appeals - Percent Decided Within			
	30 Days	45 Days	75 Days*	Remainder Undecided
Connecticut	5.3	15.5	31.4	68.6
National Average	43.2	63.6	80.5	19.5

* In this table each appeal includes the prior one. Thus, the 75 day figure includes the previous percentages.

[56]The Connecticut state Labor Department must submit a "Form ES-221" entitled "Benefit Appeals" to the United States Department of Labor on a monthly basis. That form provides information about the time lapse between the date of filing an appeal and the date of mailing the Commissioner's decision. The time lapses are broken into four categories: 0-30 days, 31-45 days, 46-75 days, and over 75 days. (Compare the more detailed breakdown for December, 1972, in note 54, *supra*). The following table represents the figures presented for intrastate appeals in the three most recent months for which data was submitted to the District Court.

Number of Days	March, 1973	February, 1973	January, 1973
0-30	3	0	0
31-45	4	1	0
46-75	2	6	3
Over 75	676	521	503
Total	685	528	506

See, Steinberg v. Fusari, 364 F.Supp. 922, 934 n. 23 (1973), J.S.A. 18A.

As the District Court concluded:

> If the appropriate weighing of governmental interests against those of the individual is really a case by case process, *see Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961), it seems patent that the results of the weighing process employed in *Torres* are inapplicable here.
>
> *Steinberg v. Fusari*, 364 F. Supp. 922, 934 (D. Conn., 1973), J.S.A. 19A.

Coupled with this, the District Court also found that a significant number of claimant appeals from the "seated interview" decision result in reversals of the original decision. For example, the District Court found a reversal rate of 26.1% for the year July, 1971 to June, 1972; 26.0% for the period of July, 1972 to October, 1972; and 19.4% for the period of January, 1973 through March, 1973. *See, Steinberg v. Fusari*, 364 F. Supp. 922, 936-37 n. 28 (1973), J.S.A. 22A.

Thus this Court must conclude that the Appellant's procedures violate due process since they provide for no post-termination hearing of any kind. Further, even considering the separate appeals procedure to the Unemployment Compensation Commission, the unreasonable delays in that process combined with the substantial reversal rate compel this Court to conclude that Connecticut does not provide for an "immediate" post-termination hearing in any constitutionally meaningful sense of that term.

C. Adequate Procedures To Provide Claimants Due Process Not Only Exist But Are Already In Use By The Appellant in Certain Limited Instances.

Once this Court determines that prior notice and hearing are required it need do no more than order the Appellant to apply the prior notice and adversarial hearing he now uses in certain limited cases to all claimants before their continued unemployment compensation benefits are withheld. *See,* Appellant's "Proposed Consent Order," A. 149a.

As the District Court found, the Appellant conforms to the requirements of due process in at least two instances. If an employee of the State Employment Service Department (which refers claimants to possible job openings)[57] has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses.[58] The claimant then has the right to confront the Employment Service employee at this hearing. In

[57]The Connecticut Department of Labor contains the Employment Security Division which deals with unemployment and is subject to the supervision of the labor commissioner as administrator. (*See,* Conn. Gen. Stat. §§31-237(a), 31-222(a). The Employment Security Division is divided into two departments, the Unemployment Compensation Department and the Employment Service Department. Conn. Gen. Stat. §31-237(a).

[58]If the claimant is scheduled to appear for a regular bi-weekly visit within two days, the notice is given to him personally then. The claimant can ask for an immediate hearing on that date, or can wait approximately five days for a hearing. If he opts for the latter course, he is routinely given his benefit checks.

the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer–one whose "merit rating" account has been charged because of the termination of the claimant's employment[59]–notice of a proposed hearing is sent both to the claimant and the employer, and a procedure similar to the one above is followed. *Steinberg v. Fusari,* 364 F. Supp 922, 925-26 (1973), J.S.A. 4A.

These two "deviations," as termed by the District Court, from the "seated interview" system were soon joined by a third in the Department's change of position prior to trial with respect to Cecil Paskewitz, a named plaintiff below.

Paskewitz had been determined initially eligible and began receiving weekly benefits for a twenty-six week period from August, 1971 to February, 1972, at which time he applied for extended benefits in accordance with Conn. Gen. Stat. §31-232b., *et. seq.*, and was approved. However, when he went in March, 1972, to receive his extended benefits check he was told that the Department had discovered that a mistake had been made in August, 1971, in computing his wage credits and he was now deemed no longer eligible and would not receive further benefits.[60] He appealed.[61]

[59]Employers' contributions to the unemployment compensation fund are determined through the operation of a "merit rating" index system. Conn. Gen. Stat. §31-226. *Inter alia,* the system operates to charge the employer's account for those claimants whose employment was terminated by him, and credits the employer for prompt rehiring of separated employees.

[60]For a more detailed description see Amended Complaint, paras. 18-20, A. 16a, and Stipulation to Facts, paras. 34-37, A. 42a-43a. Steinberg v. Fusari, *supra,* at 926-27 n. 15, J.S.A. 5A-6A.

[61]Paskewitz's appeal hearing to the separate appeals commissioner was held on October 11, 1972. To date no decision has been rendered. *See,* Stipulation to Facts, para. 37, A. 43a.

By letter to the District Court dated May 18, 1973,[62] the appellant stated that while the Paskewitz case involved a relatively automatic determination which is based solely on whether or not the claimant has sufficient wage credits, he conceded

> . . . we now recognize that redeterminations are sometimes necessary because of error or misinformation, and that due process would not be given such a claimant unless he were given a hearing.
>
> * * * *
>
> Accordingly, the defendant now concedes in this case that its former policy in not providing a hearing in such cases may violate the due process clause of the 14th Amendment to the Constitution. . . . The defendant, therefore, effective immediately is changing its policy so that when such questions arise in the future, unemployment compensation benefits will continue to be paid until a written notice is sent to the claimant notifying him to appear at a place, date, and time certain for a hearing, and advising him of the particular issue raised, and of his right to be represented by counsel.
>
> A. 147a-148a.

The Appellant also submitted to the District Court a "Proposed Consent Order" in which he went even further by stating that the above due process hearing be provided:

> Whenever the defendant has reason to believe that a re-determination must be made either as to the question of entitlement itself or as to *any change* affecting the amount of unemployment compensation benefits, then before such a change can become effective, written notice of a hearing at a place, date and time certain must be sent to the claimant at his last known mailing address, said notice apprising the claimant of the issue or issues to be raised at said hearing, and advising him that he may be represented by counsel at said hearing, and a written notice of the decision after said hearing must be mailed to the claimant.
>
> A. 149a.

[62] Reproduced at A. 147a-148a.

If, as the appellant has conceded, even in relatively simple calculations, due process would not be afforded without prior notice, a hearing and representation, we find inconsistent and disingenous that such a hearing is not required when complex factual issues based on a broad fault standard are involved. Indeed, since 60 to 70 percent of the suspension of Unemployment Compensation benefits involve those very issues, the only reason for not providing the prior hearing must be an arbitrary exclusion based on some kind of notion of "administrative convenience." It is now virtually axiomatic that with respect to the nature of the interests here involved, "the Constitution recognizes higher values than speed and efficiency." *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 656 (1972).[63]

[63] Appellant's rough analogy to the Parable of the Laborers in the Vineyard (Matt. 20: 1-16), misses its mark. He states: "Put another way, just because one does something which he does not have to do, for one person, does not mean that by so doing he necessarily must do the same for everyone." (Brief of Appellant, at 17-18.) In the Parable, even the first laborers hired were treated with fairness since at the end of the day they received the full amount they were due. In the instant case, the Appellant's conceded requirements of due process arbitrarily applied to some claimants and not to others belies this comparison. The Constitution provides that under the due process clause, each person is entitled to be treated fairly under the law.

The fact that the Appellant, under the same statutory umbrella, provides for a full due process hearing for some claimants also

In sum, this Court need only articulate for all unemployment compensation claimants the standard the Appellant already applies to limited cases, and require that whenever the Appellant has reason to believe that a re-determination must be made either as to the question of entitlement itself or as to *any* change affecting the amount of unemployment compensation benefits, before such a change can become effective, written notice of a hearing at a place, date and time certain must be sent to the claimant at his last known mailing address, the notice apprising the claimant of the issue or issues to be raised at the hearing, and advising him that he may be represented by counsel at the hearing, and that he has a right to cross-examine pivotal adverse witnesses, and that a written notice of decision must be mailed to him after the hearing.

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raises an equal protection issue. *See, e.g. Bell v. Burson*, 402 U.S. 535, 540 n. 4 (1971), *Carrington v. Rash*, 380 U.S. 89 (1965). It is not enough to say that the state has the power to treat different classes of persons in different ways, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); the classification must be reasonable, not arbitrary and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co., v. Virginia*, 253 U.S. 412, 415 (1920). In the instant case unemployed workers in Connecticut are treated differently at the whim of the Administrator.

IV.

APPELLANT'S PRESENT "SEATED INTERVIEW" SYSTEM BASED ON A BROAD FAULT STANDARD, WHICH DENIES A CLAIMANT ADEQUATE NOTICE, AN OPPORTUNITY TO CONFRONT ADVERSE WITNESSES TO CONSULT WITH COUNSEL AND WHICH PERMITS THE FACT FINDING EXAMINER TO GO BEYOND THE RECORD OF THE "SEATED INTERVIEW" TO DECIDE ISSUES FOR CONTINUED RECEIPT OF UNEMPLOYMENT COMPENSATION BENEFITS DENIES CLAIMANTS DUE PROCESS OF LAW.

A.

It is undisputed that in the Connecticut system the seated interview takes place on the same day the Department questions a claimant's continued eligibility, and that if the Department is dissatisfied with the claimant's performance or explanation the benefits are withheld until the claimant's case is decided by a separate appeals commission. *See*, Stipulation to Facts, paras. 9-11, A. 38a.

As this Court recently held in *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (opinion of Mr. Justice Stewart joined by Mr. Justices White, Rhenquist and Blackmun):

> . . . the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Mr. Justice Stewart's opinion in *Roth* quoted with approval an opinion by Mr. Chief Justice Taft in

Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926), (disposed on other grounds), in which he stated that the existence of the Tax Appeal Board's eligibility rules defining who may practice before it gave the petitioner an interest and a claim to practice there to which procedural due process requirements applied. Board of Regents v. Roth, *supra*, at 576 n. 15. Mr. Chief Justice Taft stated that the tax board's discretionary power to decide who may practice before it "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process". Goldsmith, *supra*, at 119.

In the case at bar, the District Court (after a review of all the evidence with respect to Connecticut's system of terminating Unemployment Compensation benefits), concluded that the "claimants are provided with virtually no advance notice of the interview or the precise issues involved and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf." Steinberg v. Fusari, *supra* 364, F. Supp. 922, 935: J.S.A. 20A.

The Appellant contends that "[h]ere the claimants did have notice, constructive notice at the very least . . ." because they were given a booklet and because of their experience in filing continued claims. Brief of Appellant, at 28.

In *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915), this Court stated: "Nor can extra-official casual notice, or a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the Constitution requires."

The soundness of this doctrine has been repeatedly recognized by this Court. In *Security Trust & S.V. Co.*

v. Lexington, 203 U.S. 323, 333 (1906), the Court (with respect to an assessment of back taxes), stated:

> If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute.

In *Central of Georgia R. Co. v. Wright*, 207 U.S. 127; 138 (1907), this Court said, " . . . notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." *Cf. Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Wolff v. McDonald* ___ U.S. ___, 42 U.S.L.W. 5190, 5198 (1974).

A brief review of how the actual seated interview system operates, as done by the District Court, will bring the myriad of defects going to the lack of adequate due process into sharper perspective.

Section 31-235 of the Connecticut General Statutes defines eligibility for unemployment compensation, *inter alia*, as " . . . he is physically and mentally able to work and is available for work and has been making reasonable efforts to obtain work." J.S.A. 26A.

The department defines "available for work" and "reasonable efforts" for continued eligibility as follows:

> "AVAILABLE FOR WORK." You must be ready, willing and able to take any suitable job on a full-time basis.
> "REASONABLE EFFORTS TO FIND WORK." Your efforts to get a job must be the efforts which a person out of a job would make if he is sincerely looking for work. A. 250a.

However, the issue of what constitutes "reasonable efforts to obtain work" and "availability" is not a simple one but involves a broad fault concept and has caused the Department no small consternation. In 1956, the Employment Security Division issued a lengthy memorandum, a portion of which was entitled "What constitutes 'Reasonable Efforts?' "[64] Therein, the Department stated that " . . . reasonable efforts are such efforts as one would ordinarily expect anyone to make who is honestly looking for work." Such effort, the memo states, depends on several *varying factors*–labor market conditions, the claimant's physical condition, the length of a claimant's unemployment, the extent to which the claimant's union serves as a exclusive hiring agent, potential sources of employment in the area, and depressed economic conditions. (emphasis added.) Yet, there is no indication that much or any of this information is made available to the "fact finding examiners." *See,* Deposition of Elenor H. Smarz, discussed *infra*, A. 80a-81a. As early as 1953, the Department attempted to clarify the issue of "availability" in an attempt to remedy abuses of the seated interview system. In a memo dated May 19, 1953 (A.123a) the Department stated it had "observed numerous local office decisions denying benefits for restricted availability which cannot be said to be supported by the facts appearing on the accompanying fact finding reports." The memo went on to state that:

> These are cases in which the findings of fact as prescribed in the fact finding report raise nothing more than a mere inference or an implication that the claimant is imposing a restriction on her availability–and it must be remembered that a

[64] Reproduced at A. 117a.

> decision based on inference or implication is as vulnerable as a decision based on presumption. The fact finding reports in these cases are completely defective since they do not contain complete coverage of the question whether an actual restriction exists, and, conversely, the decisions are questionable since they are not supported by the facts appearing in the fact finding reports.
>
> The mere fact that the claimant believes herself to be entitled to at least $1.15 an hour cannot compel a sound conclusion that the claimant *will not* accept employment which pays less than the figure. Hence, her statement does not support a conclusion that she has imposed a restriction on her availability. (emphasis in original).

The claimant, faced with these presumptions and defects in the present "seated interview" system, is at the mercy of the fact finding examiner. It is submitted that the "seated interview" is the method least calculated to allow a claimant to present his side of the case. *See, Green v. McElroy,* 360 U.S. 474 (1959); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The Department's confusion over the standards of the "availability" for work issue continued and, in 1956 by memo[65] dated April 16 (A. 127a-128a), the Department observed that:

> Fact finding reports in cases in which the claimant has been denied benefits because of a restriction on his availability are frequently found to lack such facts as are necessary to show that the restriction in question is an unreasonable

[65] Connecticut, unlike many other states, does not have a unified policy manual for Unemployment Compensation. Consequently, Departmental policy is contained in a loose collection of memos or Policy Letters extending over a wide number of years subject to varying interpretation. *See,* Testimony of Eleanor Smarz, A. 85a-86a.

one – that the nature of the restriction is such that it constituted a serious and substantial impediment to claimant's employability. In such cases, the conclusion reached and declared by the examiner is vulnerable since it is not supported by facts in the fact finding report. This type of situation points up a need for improvement in the process of recording the facts, if not in the interviewing technique.[66]

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[66]See, A. 127a-128a. Indeed, this memo goes on to observe:

2. Evaluation of the fact finding reports discloses the following areas of inadequacy which require special attention.

   a. Clarity of presentation

   There is still a tendency on the part of some examiners to report facts in fact finding reports with a degree of vagueness and indirection with the result that, where this occurs, facts in the fact finding reports are not articulate and precise. There is an urgent necessity for required facts to be recorded in fact finding reports in direct, unequivocal, and positive language so that there is no room for conjecture as to the meaning or purpose of such facts in relation to the whole case.

   b. Sufficiency of facts

   This is found to be a problem particularly in cases involving quits and restricted availability.

   Where there is an intimation that the claimant quit his job for more than one reason, one disqualifying and the other not, the contents of fact finding reports in such cases often suggest a failure by the examiner to explore the surrounding circumstances with a view toward determining which was the motivating reason for the quit. There is room for improvement in interviewing technique in this area.

   * * * *

   c. Exhaustion of Sources, Rebuttals, etc.

   The requirement of an opportunity for rebuttal is too often ignored in cases in which claimant and employer have offered inconsistent versions of the circumstances of a separation. This area is one of vital importance and merits close attention and correction since the validity and propriety of decisions is often affected by the denial of an opportunity for rebuttal.

It is submitted that the fault is not in the "interviewing technique" but in the system of a "seated interview" where the fate of the claimant is wholly dependent upon the "fact finder" rather than in a due process hearing where facts can be adequately presented and adequately developed.

The Department memo to fact finding examiners dated May 13, 1959 (reproduced at A.129a) is illustrative of the need for an adequate due process hearing. It states:

> The "Comment" section of the fact finding report form is intended to afford the fact finding examiner an opportunity to include in his report any material which in not factual and therefore is not a part of the factual content of the report itself but which may have been utilized by the examiner in the process of arriving at his decision. For example, the "Comment" section may quite appropriately carry the examiner's personal remark concerning a doubt in his mind to the claimant's credibility and an explanation of the reason for that doubt.

The seated interview is inadequate due process since it takes an unrepresented claimant, without notice, and puts him at the peril of his own presentation and his own appearance.

What this series of memoranda shows is the serious defects in the seated interview process. The failure to adequately state and develop the facts is due in no small way to the quandry, inarticulateness and even poor appearance of the unrepresented claimant who must submit to a "seated interview" without notice. We maintain that the "seated interview" is a system replete with inherent defects against a fair presentation of the claimant's case.

Without the right to confront not only adverse witnesses, but the sufficiency of the "seated interview" policies and procedures themselves, a claimant is often

powerless to rebut charges made against him for, as this Court recognized in *Green v. McElroy*, 360 U.S. 474 (1959), a claimant is at the mercy of "individuals whose memory may be faulty or who, in fact, might be perjurers or who are motivated by malice, vindictiveness, intolerance, prejudice or jealousy. Green, *supra*, at 487. *See also, Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970).

Two other Department memos covering a short period between October – November 1972, a time of peak unemployment in Connecticut and the nation, illustrate the vulnerability of the present seated interview system and underscore the immediately preceeding comments.

By Department memo dated October 6, 1972 (reproduced at A.131a) all Local Office Managers were advised that:

> Claimants are to be fully advised of their rights, informed clearly and unequivocally what section or sections of the law are involved, and they should be informed of what they are expected to do by way of job search and exposure to the labor market. This is not to say the claimants should be told how to "beat the system," but a claimant under the law, as interpreted by many court decisions, is entitled to know the law and know why he or she is being declared ineligible or disqualified for benefits.
>
> If a person restricts his availability or indicates a job type preference which turns out to be restrictive, the claimant should be told that he or she could disqualify himself or herself.

Slightly more than a month later, fact finding examiners had to be again admonished by policy memo dated November 16, 1972 (reproduced at A. 123a), in the following manner:

> A directive was previously issued requiring local office personnel of both ES and UC to advise claimants and clients when their conversation, course of conduct, or other acts or omissions may result in disqualification or declaration of ineligibility. Since the directive has been issued, there have still been instances where, for example, senior citizens were not advised that their Social Security restrictions would result in disqualification and where geographical preferences, as opposed to restrictions, resulted in disqualifications. Please reemphasize that we are here to serve the public and to properly administer the law and that proper administration requires complete candor and fairness with all.
>
> Questions should not be phrased with a result in mind. If, during questioning, a claimant appears to be unaware of the applicable provision of the law, he should be advised of it.

This memo concludes significantly that: "[L]ocal office managers and fact finding examiners are requested to comply with Mr. Eisenman's directive to the fullest extent and *without further delay*." (emphasis added). Thus, we have come full circle from the Department memo of May 19, 1953, and what these policy memos point out is that the problems in the seated interview system are inherent and permanent – the system is malignant.

As this Court has stated, "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Further, as this Court has stated:

> In the present context these principles require that a recipent have timely and adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by

> confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
> *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (footnote omitted).

B.

A comparison of the testimony of Department Officials Theodore Hatcher and Eleanor Smarz deals the fatal blow to the Appellant's contention that the "seated interview" is a relatively simple procedure which needs no due process safeguards. It will show further that there is substantial difference on crucial substantive and procedural points even within the Department itself, a difference which goes to the heart of the lack of adequate due process afforded the claimant.[67]

Theodore Hatcher is the Unemployment Compensation Director for the State of Connecticut. Eleanor Smarz has been employed by the Department for approximately 25 years and is presently the Manager of the Bridgeport Unemployment Office. (S: A.49a, 59a, 60a).[68]

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[67] As the District Court correctly observed:

> Of course, the formulation of an appropriate system is in the first instance a responsibility of the defendant Administrator. But when an administrator is making as subjective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case and to meet any unfavorable evidence. This the present system does not do.

Steinberg v. Fusari, 364 F.Supp. 922, 936 (1973), J.S.A. 21A-22A.

[68] By stipulation all parties agreed that the deposition of Mrs. Smarz was admissible as evidence of Department policy (*See*, A. 46a.).

Both Hatcher and Smarz agreed in their testimony that a question of eligibility arising in the claim line will lead to a seated interview. (H: A.165a; S: A.52a). Both also agreed that the seated interview involves the determination of complex factual issues (H: A.171a; S: A.72a-80a, 84a-85a), applying a broad, and in some cases, a difficult statutory standard (H: A.172a; S: A.84a), and often relying on third-party information. (H: A.171a, 18a-181a; S: A.55a). The first substantial difference, however, arises as to the weight given to the information supplied by a third party not required to be present at the seated interview. (H: A.186a).

On this point Hatcher maintained that if a question arises which needs the confirmation of third-party information, and that third-party cannot be contacted there at the seated interview "... there is a[n] [unwritten] policy throughout the Department that the claimant gets the benefit of the doubt." (H: A.180a-181a). Mrs. Smarz testified though, that if the third-party cannot be contacted, the claimant may or may not get benefits "... depending upon what the other circumstances there are involved, in a situation." (S: A. 44a.) She said that in many instances the claimant is given the benefit of the doubt, but continued "... its difficult to give you a direct yes or no answer to any of these instances because I do not know the exact circumstances of the case." (*Id.*) This difference is important because as Hatcher maintained, he could not think of any other major reasons for

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For convenience, the testimony of each will be cited directly in the text by the corresponding letter designation of "H" or "S" followed by the appropriate page number of the Single Appendix. Longer quotations, however, will be cited in the footnotes.

disqualification that did not categorically involve third-party information. (H: A.186a-187a).

Both agreed that one of the major factors in a claimant's disqualification arises from disputes over his "reasonable efforts to find work." (H: A.187a; S: A.53a). As to what factors must be taken into account, Mr. Hatcher testified, "Well, the condition of the labor market, the individual's job classification, the claimant's exposure up to this time to the job market, if the individual has already exhausted the job potentials in the area, all of this has to be taken into consideration." (H: A.187a).

The exchange on the same point with Mrs. Smarz took the following form:

> Q. In order to handle it on an individual case, to make a fair determination on an individual case, the fact-finding examiner would have to know quite a bit about the claimant, would he not. He'd have to know the man's background, the size of his family, his past work record, how badly he needs employment, what type of man he is, his physchological makeup, he would have to know quite a bit, wouldn't he, to make an individual determination? What is reasonable for that man might not be reasonable for another man, isn't that right?
>
> A. Well it's impossible to know all that about an individual as far as that's concerned, but the type of work that he's seeking and something about his background in that particular work and where it's available and what efforts he has made to get that type of work would be my main concern.
>
> Q. There is in fact, no written list of all of the factors which might influence a decision on whether a reasonable effort to find work has been made, isn't that correct?
>
> A. Not to my knowledge.

> Q. And in fact, such an exhaustive list would probably not be possible, would it, since there are so many factors which might influence a particular determination by a fact-finding examiner?
>
> A. That's true.[69]

On the question of what is "reasonable effort" to find work Mrs. Smarz testified that it is not specifically defined anywhere to her knowledge. (S: A.76a). Mr. Hatcher testified that he thought it meant "[t]hat the individual [must] do what can reasonably be expected of him to try to find work if he is truly attached to the labor market. . . ." (H: A.188a).

Both Department Officials agreed that the condition of the labor market is one of the important factors in the determination of a claimant's "reasonable efforts." (H: A.187a; S: A.80a-81a). A critical difference arises though on the question of whether the fact finders are ever made aware of the condition of the labor market. Mr. Hatcher testified that he is "sure" this information is made "available" to them. (H: A.189a.) Mrs. Smarz offers a more incisive view:

> Q. . . . was that information passed on to the fact-finding examiners during each month? Are they informed of what the unemployment rate is?
>
> A. No.
>
> Q. They're not?
>
> A. Not the percentage figure, no.
>
> Q. In the policy claims letter referred to earlier dated October 22, 1956,[70] it states that it is not

[69]S: A. 84a-85a.

[70]Reproduced at A. 117a.

intended to require claimants to make futile trips to employers' hiring halls just for the sake of building up a record of job seeking when there are not many jobs available. Do your fact-finders take into account the job market when they're making a determination as to reasonable effort?

A. To a certain extent.

Q. But they are not given the information on a regular basis of what the economic indicators show for availability of jobs?

A. Well they may have a general idea, in discussion, but I don't actually give them the information on a percentage basis, the actual statistics.

Q. So that you're not sure to what extent they take into account on their fact-finding decisions?

A. (unintelligible).

Q. Have you ever seen it [the condition of the job market] described as one of the factors that influenced the decision of a fact-finder when he writes his fact-finding report, as being the basis for his decision, or one of the factors?

A. Not that I remember.[71]

A third crucial difference which affects the lack of due process afforded a claimant by the "seated interview" arises when we try to ascertain the Department's actual standards regarding the U.C. 45 form. As a condition of continued eligibility, a claimant is required to submit a completed U.C. 45 which lists the dates and the places he has gone seeking employment.[72] This is examined at each benefit period and if a problem arises, he is required to have a "seated

[71]S: A. 80a-81a.

[72]Reproduced at A. 121a-122a; *See also*, Stipulation to Facts, para. 8, A. 37a.

interview." There is a critical difference in testimony as to how many places of prospective employment a claimant must list on his U.C. 45. In response to a question as to whether a statewide policy exists on this issue, Mr. Hatcher testified that it is an [unwritten] state policy that three places a week [six in a two-week benefit period] are required. (H: A.190a-191a, 192a). Mrs. Smarz, though, indicates an awareness of no such policy (S: A.54a), and testified that a seated interview may be necessary regardless of the number of places listed on the U.C. 45 when a question *about* those places arises in the mind of the claims examiner. (S: A.75a).

Substantial differences also exist as to whether or not the claimant is ever informed that the standard is three places a week. At trial the following exchange between the court and Mr. Hatcher took place:

JUDGE NEWMAN: Is the claimant ever told that three is the magic number?

THE WITNESS: Yes.

JUDGE NEWMAN: When does he find that out?

THE WITNESS: He is told that on his benefit rights interview. He is told that when he is handed the work effort form.

* * * *

JUDGE NEWMAN: He is told that three a week is enough?

THE WITNESS: Yes.[73]

In answer to a similar question, Mrs. Smarz testified:

A. It was not an official notification that they were to tell these people, if that is what happened.

[73]H: A. 193a-194a.

But this is, there's no official number or anything in reference to this.

* * * *

Q. So in fact one claims examiner, I mean fact-finding examiner, might feel that six places spread evenly over two-weeks is a reasonable effort. Another fact-finding examiner might feel that eight is a reasonable effort, or ten is a reasonable effort, isn't that correct?

A. Well I can't tell you what the fact-finding, how the fact-finding examiner feels because I don't know all the circumstances for this specific case that you're referring to. There's more involved in these situations other than just the fact that this man went out to look for a job. Or that he has listed six or ten or twelve places to seek employment because there's many other factors that are taken into consideration also.

(S: A. 87a, 90a).

On cross-examination, however, Hatcher stated that the three places was a rule of thumb and that the "quality of effort" rather than the quantity is the controlling factor. (H: A.208a). As to whether or not claimants received a benefits rights interview (to inform them of their rights and obligations), Mrs. Smarz testified as follows:

Q. . . . I understand your earlier testimony that there was, at least some period when not everyone received a benefit rights interview?

A. During the crush period . . . [June and July] . . . At that time did everyone get a benefit rights interview? They couldn't.

(S: A.94a).

As the District Court concluded:

Thus serious questions arise about whether a claimant can ever meet a burden of proof based on

a "rule of thumb" that he has never heard of? Indeed, even Mr. Hatcher conceeded that in "crush periods" not everyone receives a benefit rights interview, at which the information is supposedly imparted.

Steinberg v. Fusari, 364 F.Supp. 922, 935-936 n. 25 (1973); J.S.A. 20A-21A.

Indeed, this confusion within the Department itself illuminates the fallacy of the Appellant's basic contention that ". . . it is the claimant alone in most cases who knows in advance what issues will be raised when he reports . . . "Brief of Appellant, at 21. Appellant's argument was in fact rejected by the District Court when it said:

The claimant surely cannot be expected to bring counsel and witnesses to every bi-weekly claims session, on the off chance that a "seated interview" will result. Nor can the claimant be certain in advance of the subject matter of the interview. While questions involving reasonable efforts at finding work are most common, "seated interviews" can and do involve numerous other grounds for possible disqualification. *Cf.* Conn. Gen. Stat. §31-236.

Steinberg v. Fusari *supra*, at 935 n.25; J.S.A. 20A.

What this foregoing comparison shows is that first, the Department is and has been operating a "seated interview" procedure at which the claimant must appear without notice or representation to joust for his Unemployment Compensation benefits which he and his family so desperately need. The procedure is in fact not an "interview" but is an adversary proceeding with the full investigative resources of the Department brought to bear on the claimant. Indeed, the claimant is the

only party not adequately represented.[74] Secondly, the Department has been operating this procedure without adequate standards or safeguards and indeed is in conflict with itself. Thirdly, as this comparison shows, the present procedure is not operating as smoothly and as equitable as the Appellant would have this Court believe. Lastly, all the factual evidence in this case shows a necessity for this Court to require an adequate due process hearing before a claimant's Unemployment benefits can be suspended or terminated.

The affidavits of the Appellees Juan Miranda and Delia Triana speak precisely to this point and reflect what happens to an unrepresented claimant at the seated interview which the defendant claims provides "enough due process." Mr. Miranda states:

> I speak and read very little English. At no time was any explanation given to me either in Spanish or English by anyone at the unemployment office as to what my responsibilities were in making efforts to find work.
>
> * * * *
>
> I was told I had not visited enough prospective employers and was not given a chance to rebut this allegation.
>
> * * * *
>
> I have been without income for myself and my family since my unemployment benefits were terminated in August. I have no present means of supporting my family, other than handouts from other people. I am unable to pay my rent and I am unable to buy enough food for my family. I

[74] As this Court noted: "his impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching decisions on eligibility. *Goldberg v. Kelly*, 397 U.S. 254, 264 n. 12 (1970). This is no less true in Connecticut where the District Court found a reversal rate of 19-26%. *Steinberg v. Fusari*, 364 F.Supp. 922, 936-937 n. 28 (1973); J.S.A. 22A.

> have tried to find work everywhere but the jobs are not there.
>
> Each two weeks since my benefits were terminated I have gone to the Unemployment Office and showed a fully completed form U.C. 45, showing the places I had looked for work during the two weeks. Each time the worker barely looks at the card and tells me I get no checks. Sometime the worker tells me to wait until my initial appeal is heard. On October 11, 1972 as I testified at my appeal hearing on October 17, the worker would not even take my written statement as to my efforts to find work.[75]

As the Appellee Delia Triana states:

> I do not understand written or spoken English and since the unemployment office did not supply an interpreter on the occasion of my visits, I was required to bring and was told to bring my own interpreter. I was required to bring one of my young children to the unemployment office when I visited.
>
> In early July, I was told, through my child interpretering, that I must take one of the forms that was given to me and get prospective employers to sign the card indicating I had visited and asked for employment.
>
> I had the cards signed by several employers during the period after July 10th, 1972 but on both occasions when I went to the unemployment office (at two weeks intervals) I was told that not enough employers had signed the card. I did not fully comprehend what was being asked of me and again asked for an interpreter and was told to get one for myself.

[75] Affidavit of Juan Miranda, September 6, 1972; Supplementary Affidavit of Juan Miranda, October 18, 1972. *See*, A. 139a-142a.

> In late July, I was told that I should have six employers sign the card. My next appointment at the unemployment office was on August 7th, 1972 and on that occasion my card had been signed by six employers stating that I had applied for work at their offices.
>
> On August 7th, 1972 I was again refused an unemployment check and was told that while I had six employers sign the card, they had all signed the card on the same day and that this disqualified me for unemployment benefits since I had not spread the six employers out over the two week period. I tried to explain to the officials that since I did not speak English, I could only go on Fridays when one of my children could accompany me to do the interpretering, I was told that this was unsatisfactory and that I was disqualified indefinitely from receiving benefits from July 9th, to an indefinite period because I had not used "reasonable effort" to find employment.[76]

To conclude, the function of notice is to inform the recipient of the nature of the evidence against him in advance of the hearing that he may have an adequate opportunity at the hearing to contest its accuracy. *See, Morgan v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950).

As this Court stated long ago:

> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose . . . [A] man should not be required . . . instantly to answer a charge . . . on the same or even the next day and should be allowed not only applicable time to obtain legal advice and assistance, but also to

[76] Affidavit of Delia Triana, September 12, 1972. See, A. 135a-136a.

> collect his evidence; and even the convenience of witnesses should be considered; and therefore in general several days should intervene between time of [notice] and hearing.
>
> *Roller v. Holly*, 176 U.S. 398, 409-410 (1900).

Goldberg further recognized that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnessess." ***Goldberg***, *supra*, 397 U.S., at 269-270. But at the Appellant's "seated interview," a recipient is allowed no opportunity to confront and cross-examine the many outside sources whose information may be the basis for his disqualification. As this Court stated in *Green v. McElroy*, *supra*, at 497-498:

> . . . [T]he requirements of confrontation and cross-examination . . . have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous in protecting these rights from erosion . . . in all types of cases where administrative . . . actions were under scrutiny . . . (citations omitted).

Goldberg also specifies that a terminated recipient is entitled to an "impartial decision maker" and a decision "resting solely on the legal rules of evidence induced at the hearing." *Goldberg*, *supra*, 397 U.S. at 271. In the case *In Re Murchison*, 349 U.S. 133 (1955), this Court held that due process requires a decision maker who is not both investigator and judge, arbitor and advocate. However, in both the determination of eligibility and "seated interview" stages, the department employee is both investigator and judge, since he is responsible both for collecting information and "checking" the recipient's allegations and for making the decision whether to terminate benefits. Moreover, the interviewing clerk responsible for terminating benefits may

have had a previous and long-hostile involvement with the claimant. However characterized, defendant's "seated interview" is essentially one between adversaries, albeit very unequal ones, pitting the interviewer against an often intimidated recipient. During the interview mutual hostility is commonplace. *See*, Harris, "Claimant's View of Unemployment Compensation Insurance in California", 4 *Unemp. Ins. Rev.* 2 (1967). The scope of the inquiry is entirely in the hands of the interviewer. The facts and issues are as he defines them. This indeed represents"... the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As the appellant concedes, the department employee who conducts the "seated interview" is not required to rest his findings or decision solely on the facts and rules in evidence produced at the hearing; thus he may base the ruling on his background, his own background and knowledge or on information obtained outside the interview.

Lacking the procedural safeguards mandated in *Goldberg*, the accuracy of the appellant's "seated interview" terminations depends solely on the interviewing employee's inclination, ability and time to secure and judge relevant information, his application of very broad statutory standards such as "reasonable effort to seek work" to the multitude of facts which can influence this decision, and on the ability of recipients who are frequently of limited education and often experiencing language difficulties to marshall and articulate their cases on the spur of the moment to an

accusing department employee. The likelihood of error inherent in these circumstances is substantial.[77]

After summarily terminating recipients, the appellant does not even afford them a prompt post-termination evidentiary hearing. Moreover, even if this were true, this Court has held in *Wheeler v. Montgomery*, 397 U.S. 280 (1970) in rejecting the argument that because the recipient is afforded some of the elements of due process at a hearing prior to the termination of benefits, the recipient's due process rights can be satisfied completely in a hearing subsequent to the determination that he is eligible for benefits as in one held prior thereto, it held unconstitutional a pretermination "informal" conference which was substantially identical to the department's informal "seated interview" procedure at issue in this case. See also *Stanley v. Illinois*, 405 U.S. 645 (1972).

Thus the District Court was eminently correct when it ruled that the "seated interview" system denied claimants due process of law because:

> Claimants are provided with virtually no advance notice of the interview, or the precise issues involved and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact-finding examiner may go beyond the record of the "seated interview" in making his decision; when that

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[77]In discussing the unemployment examiner's counterpart in the welfare system this Court in *Goldberg* recognized the great possibility of honest error or irritable mis-judgment." *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970), quoting *Kelly v. Wyman*, 295 F.Supp. 893, 904-905 (S. D.N.Y. 1968) (Three Judge Court.)

decision made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualification.

Steinberg v. Fusari, 364 F. Supp. 922, 035 (D. Conn. 1973)

V.

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING A POST-TERMINATION EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

This Court can decide this case without reaching the constitutional question of whether the Fourteenth Amendment requires an evidentiary hearing prior to the suspension of unemployment compensation benefits by addressing the statutory claim of the appellees, an issue the District Court felt unable to decide. The lower court (J.S.A. 13A, 22A, 23A) felt constrained by this Court's per curiam summary affirmance in *Torres v. New York State Department of Labor*, 405 U.S. 949 *rehearing denied*, 410 U.S. 971 from deciding the statutory issues presented herein. Indeed, the appellant (Brief of Appellant at 11, 15, 22) feels the *Torres* precedent controls the issues in this case. This Court has not accorded summary affirmances such weight.

This Court's recent decision in *Edelman v. Jordan*, ___ U.S. ___, 39 L.Ed.2d 662, 677, (1974) counsels us that "summary affirmances . . . . obviously are not of the same precedental value as would be an opinion of

this Court treating the question on the merits." Although Mr. Justice Rehnquist spoke in terms of the constitutional issue presented in that Eleventh Amendment decision, the appellant's reliance on *stare decisis* even for the statutory argument in *Torres* is incorrect because of this Court's statement in *Edelman*, supra 39 L.Ed.2d at 677 n. 14, that statutory issues never fully briefed or argued may also be reconsidered. *See also* Mr. Justice Powell's concurring opinion in *Mitchell v. W.T. Grant*, 40 L. Ed. 2d 406, 425 n. 2, (footnote omitted). In *Boys Market Inc. v. Retail Clerks Union*, 398 U.S. 235, 240 (1970), Mr. Justice Brennan noted for the court in interpreting The Norris-LaGuardia Act that:

> *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope intrinsically sounder and verified by experience *Helvering v. Hallock* 309 U.S. 106, 119 (1940) *Swift Co. v. Wickham* 387 U.S. 111, 116 (1965).

Since appellees maintain that the instant case turns on the proper interpretation of the Social Security Act, *Torres* does not foreclose a more searching analysis of that question. Rather *Torres* stands as a significant departure from this Court's view in *Java* that the Congressional policy on unemployment benefits is that it provides "early substitute compensation (to worker) during unemployment." 402 U.S. 121, 134. To understand the meaning of the Social Security Act, regarding unemployed workers both §§303(a)(1) and 303(a)(3) must be examined together. But in *Torres*,

the appellants never brought §303(a)(3) before this Court.[78]

Thus *Torres* "lacks the precedential controversy" (*Bob Jones University v. Simon*, ___ U.S. ___ 40 L.Ed.2d 496, 511 n. 11) since the issue of §303(a)(3) was never raised to this Court. Compare *California Department of Human Resources Development v. Java* 402 U.S. 121 (1971).

Indeed, by finding that such a hearing is required by statute would be in line with this Court's practice of scrutinizing Congressional intent and construing statutory requirements closely in order that delicate constitutional issues on procedural due process need not be reached. *See, Greene v. McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun v. McGrath*, 339 U.S. 33, 48-51 (1949), *Wright v. Richardson* 405 U.S. 208, 213 (Brennan J. Dissenting).

Section 303(a) of the Social Security Act, 42 U.S.C. Section 503(a), provides:

> The Secretary of Labor shall make no certification for payment (of federal funds for administration of state unemployment compensation statutes) to any state unless he finds that the law of such state, approved by the Secretary of Labor under the federal Unemployment Tax Act, includes provisions for –
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied.

[78]Jurisdictional Statement in No. 71-5743, Page 3.

An examination of the statutory purposes of the Unemployment Compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that under the "when due" and "fair hearing" requirements, recipients must be provided with a full opportunity to be heard before the suspension of their benefits.[79]

In enacting the Unemployment Compensation program, Congress sought to achieve three principle purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the unemployed, thereby stabilizing consumer demand and sustaining the economy. See generally, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 130-133, (1971).

To achieve these purposes, Congress intended a hearing procedure that insures that payments are made

[79]It is clear that this court has power to review the issue of whether the department's procedures comply with the Social Security Act, regardless of administrative approval of those procedures by the Secretary of Labor. *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397, 420-23 (1970); *King v. Smith* 392 U.S. 309, 333 (1968). In Java, *supra*, the Secretary had not only approved the challenged procedure, but also submitted a brief *amicus curiae* arguing that it conforms to the provisions of the Act. This Court, citing *Rosado v. Wyman*, 397, 420-21 (1970), nonethless reviewed the issue independently and held that the California procedure violated the Act. Java, *supra*, 402 U.S. at 135. It rejected the argument advanced by California that the administrative approval of the procedure by the Secretary of Labor precluded judicial review. *See, California Department of Human Resources Development v. Java, supra*, Brief of Appellant at 10.

to workers at a time in their unemployment cycle, when such goals would be facilitated rather than frustrated. For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *See* Java, *supra*, they must also continue throughout the period of unemployment until such time as he is properly found to be no longer eligible for them. Only a "fair hearing" held before benefits are suspended can assure eligible unemployed workers full payment of unemployment compensation "when due." 42 U.S.C. §§503(a)(1) & (a)(3).

A. By Suspending Unemployment Benefits For Several Months Without A Prior Evidentiary Hearing On Continued Eligibility, The Department Defeats The Objective Of The Social Security Act And Violates The "When Due" Requirement.

1. By Causing Substantial And Unnecessary Delay Concerning Repayment Of Benefits To Eligible Recipients, The Department's Summary Suspension Procedure At The "Seated Interview" Fails To Insure The Full Payment Of Unemployment Compensation "When Due."

Section 303(a)(1) of the Social Security Act provides that State unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1). In *California Department of Human Resources Development v. Java*, 402 U.S. 121, (1971), this Court found that under this section of the Act, unemployment benefits become "due" after the initial eligibility determination – "the critical point in the [unemployment compensation] procedure." 402 U.S., at 127. Based upon this finding, the Court held

unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S., at 133.

The continued claim recipients in this case, like the recipients in *Java*, had been found initially eligible for benefits for a fixed number of weeks.[80] Yet they received no benefits pending an evidentiary hearing and decision on their continued eligibility. Indeed, the delay pending the hearing was so long that the great majority

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[80]The Department argument (Brief of Appellant at 14) that a claimant's eligibility is based upon a week to week recertification does not square with the practice of the Department, that it only conducts "periodic interviews" on continuing eligibility – Smarz Dep. A. 26a-27a, 29a-30a. Indeed the District Court in *Pregent v. New Hampshire Department of Employment Security* stated in 361 F.Supp. 784, 793, 794, (D.N.H., 1973) *vacated and remanded for determination of mootness* ___ U.S. ___, 42 U.S. L.W. 3651 (1974) ; that benefits are due "once both parties (claimant and employer) have notice and are permitted to present their respective positions" and that:

> Even though the defendant reviews on a weekly basis the eligibility of a claimant, we find that the concept of when benefits are 'due' under §§303(a)(1) of the Social Security Act, 42, §§503(a)(1), *does not change from week to week* after a claimant has been found *eligible* (emphasis added) and no due process hearing has been held with regard to a subsequent finding of ineligibility. Having been found initially eligible plaintiff was entitled to benefits until defendant afforded him a due process hearing. This requirement of a pretermination hearing is especially important because of the delay between the date that the eligibility determination is made and the date that the Appeal Tribunal's decision is rendered.

of eligible suspended recipients are already back at work by the time they received their benefits. In 1973, the average length of time an unemployed worker in Connecticut received unemployment benefits was approximately 9.3 weeks. *See,* Connecticut Labor Department Bulletins (Bi-monthly)–1973. Since 89.8 percent of all appeals took over 100 days to decide[81] and, "the figures indicate that 61.4 percent of all appeals took over 125 days to dispose of,"[82] the overwhelming proportion of unemployed workers whose benefits were wrongfully suspended eventually received them at a time when they no longer qualified for *current* payments. Thus, in the event a claimant's benefits are summarily suspended, an eligible[83] worker may receive no weekly benefits when in desperate need of this income,[84] only to receive a lump sum many months later when he is already at work. Administration of the Unemployment program in such a way negates the precise purposes compensation was intended to provide.[85]

The lower court in this case noted its agreement with another Three Judge Court in *Wheeler v. Vermont,* 335 F.Supp. 856 (D.Vt., 1971), (which struck down a similar unemployment "seated interview" system with a shorter delay period as violative of the Social Security

[81] *See,* J.S.A. at 17A.

[82] Almost 26% of the unemployed workers who appealed the suspension of their benefits are found to be eligible at the Commissioner's hearings. *See,* J.S.A. at 17A.

[83] *See,* Section I , of this brief, *infra.*

[84] J.S.A. at 21A n. 26.

[85] See page 101, *infra.*

Act;) but felt constrained by the *Torres* summary affirmance from following it.[86]

In *Wheeler* the Court stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of §303 (a)(1) of the Social Security Act, 42 U.S.C. §503 (a)(1), that the State method of administration be reasonably calculated to insure full payment of unemployment compensation when due." *California Department of Human Resources v. Java. Cf. Rosado v. Wyman,* 397 U.S. 397, 420-21 (1970), affirmed after remand, 402 U.S. 991 (1971); *King v. Smith, supra,* at 317, 333. The evidence here shows that on the average, it takes approximately 37.5 days from a time a claimant appeals from a claim examiners' determination until the Appeal Referee's decision is rendered. This delay alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due".
>
> 335 F. Supp. at 861.

[86] As Judge Smith, J.S.A. 13A, in the lower court decision noted:

> Were we writing on a somewhat cleaner slate, we would have little difficulty in rejecting the reasoning of the District Court in *Torres,* and concluding, largely for the reasons so aptly set out by Judge Oakes in *Wheeler v. The State of Vermont, supra,* that the Connecticut Unemployment Compensation procedures here challenged conflict with both the Fourteenth Amendment and the Social Security Act.

Appellant attempts to undercut the significance of the *Wheeler* decision (Brief of Appellant at 35) by asserting that the claims interview and termination procedures in Vermont differ from Connecticut because the claims examiner is not the decision maker. In fact, the "seated interview" claims examiner in Connecticut often has his eligibility decision checked by the office manager and approved by that supervisory personnel. (Smarz Deposition–A., 61a, 62a).

The Department does not dispute the fact that unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work (Brief of Appellant at 4)[87]. *See also*, Java, *supra*, 402 U.S. at 130-33. However, as shown above, the Department's own statistics reveal that the Connecticut scheme does not result in paying benefits during the "limited period" between jobs as Congress intended but rather results in payments several months after unemployment has ended. *See*, H.R. Rep. n. 615 74th Cong., 1st Sess. (hereinafter "H.R. Rep.") at 7 (1935); *Report to the President of the Committee on Economic Security Hearings on S. 1130 before the Senate Committee on Finance*, 74th Cong., 1st Sess. at 1321-22 (1935).[88]

Since the suspension of benefits pending an evidentiary hearing systematically denies early substitute "compensation during unemployment"[89] to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act and, as the Courts in *Burney*, *Pregent*, and *Wheeler* found, is not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503 (a)(1).

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[87]See Note, *infra* p. 108.

[88]As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not 4 or 5 weeks thereafter.

Report of the State Senate, Interim Committee on unemployment insurance to the 56th California legislature, 62 (1945).

[89]See, *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971).

2. The Departments' "Seated Interview" Suspension Procedure Frustrates The Congressional Purposes Of The Unemployment Compensation Program.

The summary suspension of benefits forces eligible recipients to rely on welfare or charity for sustaining funds. Connecticut does not participate in the AFDC-UP program for unemployed workers; (*See*, J.S.A. at 19A). It has a system of "town assistance" Conn. Gen. Stat. §17-277 et seq. which provides that an unemployed worker must be registered for work and available for work to receive welfare benefits. If a claimant is disqualified from receiving unemployment benefits for failure to make "a reasonable effort to find work." Conn. Gen. Stat. §31-235(1), (*See*, J.S.A. at 3 A), he is also similarly ineligible for town welfare. Conn. Gen. Stat. §17-273, 42 U.S.C. §§602(a)(19), 607(b)(1)(B).

As this Court has already determined, the chief purpose of the unemployment compensation program is to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels with the necessity of his turning to welfare or private charity." Java, *supra*, 402 U.S. at 131-32. *See, generally*, H.R. Rep. at 7; S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). Therefore this Court's assessment of the function of unemployment compensation as a social insurance system to keep unemployed workers off welfare rolls differs markedly from the Court's recent viewpoint on the financial harm a discharged federal employee may suffer in *Arnett v. Kennedy*, 40 L. Ed. 2d 15, 42 (concurring opinion of Mr. Justice Powell joined Mr. Justice Blackmun). Thoroughly familiar with the plight of workers "thrown out of work sudden-

ly,"[90] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. Rep. No. 628, *supra*. However, because of the stigma attached to welfare, it was believed to be an inappropirate means of sustaining workers during temporary periods of unemployment. As was brought out on the House Floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon their previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton.)

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance on general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with the sustenance during a period of economic downturn. *See, Steward Machine Company v. Davis*, 301 U.S. 548, 586-87 (1937); Note, *Charity v. Social Insurance of Unemployment Compensation Laws*, 73 Yale L.J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very

[90]See *Hearing on H.R. 4120 before the House Comm. on Ways & Means*, 74th Cong., 1st Sess. 214 (1935) (statement of Harry L. Hopkins).

materially reduce the cost of relief in future years,[91] the employment security fund was designed to accumulate reserves in times of economic prosperity," *See*, H.R. Rep., at 7,[92] and that employers pay their fair share into the general fund.

In order for unemployment compensation to provide workers "security during the period following unemployment," Java, *supra*, 402 U.S. at 132, and thereby "to replace [relief] in large part," H.R. Rep., at 7, benefits payments must continue throughout the period in which the unemployed worker has been found eligible.[93] Interrupting the payment of benefits for

[91]S. Rep. No. 628, 74th Cong., 1st Sess. at 12. *See also, Java v. California Department of Human Resources Development*, 317 F.Supp. 875, 879 (N.D. Cal., 1970), aff'd 402 U.S. 121 (1971), in which the Court stated: "the most fundamental purpose in which both the federal and state unemployment compensation laws is to '*prevent* the burden of injured employees becoming charges upon society,' " (citations omitted.)

[92]Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocation caused by a severe period of unemployment. For example, in enacting emergency unemployment compensation benefits in 1971 to relieve the drain on unemployment funds, the Connecticut legislature recognized the need for additional benefits to help workers unemployed for long periods of time. *See* Conn. Gen. Stat. §231-232 (a) et seq. *See also*, Federal State Unemployment Compensation Act of 1970, P.L. 91-373, 84 Stat. 811, as amended by P.L. 92-329, Stat. 398 which provide extended unemployment benefits for those who exhaust the mandatory state allotment of unemployment insurance.

[93]The Connecticut Supreme Court in *Waterbury Saving Bank v. Danaher*, 128 Conn. 78, 82-83 (1940) recognized the importance that unemployment workers be paid benefits at once because:

> The act was adopted in consequence of the enactment of the federal social security acts . . . It was designed to ameliorate the tragic consequences of the enactment of unemployment . . . pursuant to the plan effective under

several months pending an evidentiary hearing forces a large number of unemployed workers to turn to relief or leaves them with no income whatsoever. Thus by suspending a recipient's benefits before the evidentiary hearing on his continued eligibility, the Department undermines the congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity," Java, supra, at 131-32, thereby increasing the burden on the already overburdened state and local taxpayer.

Appellant's contention that in making a claim for unemployment compensation, that each week the claimant must make an affirmative showing (Brief of Appellant at 14) as to eligibility is factually unsupported. As the record below (A. - 58a, 59a) indicates throughout, a claimant need only present his slip for benefits at the claims window, and his check will be presented to him provided the statement of availability for work has been signed on the back of the benefit slip. The Department's investigation of claimant eligibility at the claims window is sporadic and haphazard at best (A - 72a) and surely is not the thorough case-by-case review suggested by the Department (Brief of Appellant at 4 - 5).[94]

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it. . . . employees who lose their jobs may, after a waiting period be paid benefits limited in amount and duration, while looking for work but unable to find it. . . . that the purpose of the act is remedial is clear. It is therefore to be construed liberally as regards beneficiaries in order to accomplish its purpose.

See also, Reger v. Administrator, 137 Conn. 647, 650 (1946); *Mishaw v. Fairfield News,* 12 Conn. Supp. 318, 320 (1943).

[94]As of August, 1973, the Appellants have discontinued (A. - 129a) the use of their work search effort slip (U.C.-45 form) which was the form that caused discontinuance of the named plaintiff's, Miranda and Triana. This eligibility standard was removed once unemployment claims began to decrease in the Fall of 1973.

See U-I Statistics, January 1974, Table 16.

3. The Summary Suspension Of Benefits Renders Eligible Workers Less Able To Find Substantially Equivalent Employment.

Unemployment compensation was established by Congress "as a means of assisting a worker to find substantially equivalent employment." Java, *supra,* 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to include that unemployment compensation program, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.
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> Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

If manpower is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. However, the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on "basic necessities." *Cf. Goldberg v. Kelly,* 397 U.S. 254, 264

(1970). Thus, to the extent that the payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By suspending benefits pending an evidentiary hearing, only to pay them in a lump sum many months later, the Department is often responsible for a greater withdrawal from the employment security fund than if payments were made in their regular course during the initial stages of unemployment.

4. The Summary Suspension Of Benefits Reduces The Purchasing Power Of The Unemployed.

Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H.R. Rep. at 7; *See generally*, Java, *supra*, 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms which in turn causes further unemployment and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity.
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> *Hearing on S. 1130 before the Sen. Comm. on Finance*, 74th Cong., 1st Sess. 2 (1935).[95]

Thirty-five years later, in reporting the FEDERAL - STATE EXTENDED UNEMPLOYMENT COMPENSATION ACT OF 1970 (P.L. 91-373), the Senate Committee on Finance reiterated the vital role of Unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a state or in the nation experienced unemployment which extends beyond the periods for which they are protected under current state laws, the resulting uncompensated unemployment may have a serious impact not only upon the workers and their own families but on the purchasing power and on the economic health of the entire nation.

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[95]Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance come to a recognition of the small merchants of a locality and those who provide them with their stock, have derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect on unemployment in other lines than on that first depressed.
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> *Hearings on S. 1130 before the Sen. Comm. on Finance*, 74th Cong., 1st Sess, 111 (1935).

S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970), *U.S. Code Cong. and Admin. News, at 3635.*

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment, not in lump sum form long after unemployment has ceased as is frequently the result under the Department's summary suspension procedure. Payments must *regularly* be made, "early in the downturn, immediately after unemployment makes its appearance." *See,* Clague, *The Economics of Unemployment Compensation,* 55 Yale L.J. 53, 69 (1945).

Uninterrupted payments enable workers and their families:

> . . . to preserve existing assets, such as homes, furniture and automobiles, thus avoiding the forced liquidation of assets which aggravated the down-turn in business. They encourage more confident spending of resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of worker when they are faced with unemployment.
>
> Clague, *supra,* 55 Yale L.J. at 69.[96]

Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food and clothing." *Id.* By interrupting the steady stream of payment benefits to

[96]Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that (it) should be so used."

Statement of Senator Robert F. Wagner, *Hearings on S. 1130 before the Sen. Comm. on Finance,* 74th Cong., 1st Sess., 2 (1935).

unemployed workers for several months pending an evidentiary hearing, the department's summary suspension procedure thus frustrates the Social Security Act's objectives of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf.* Java, *supra,* 402 U.S. at 132-133.

5. The Continued Claim Recipient Is Entitled To Protection Of The "When Due" Clause.

In disregarding the fact that the summary suspension of benefits for several months directly contravenes the purposes of the "Social Security Act," the Department attempts to justify the interruption of benefit payments arguing that each week constitutes a "new eligibility determination and that benefits are therefore only 'due' for a one week period." (Brief of Appellant at 8, 14). Both the Department's terminology and its practices belie this contention. After the initial eligibility investigation *see,* Java, *supra,* 402 U.S. at 125-38, the worker who has been found initially eligible is placed by the Department in a "continued claims category." *See,* Department Form U.C.-45, A-122a. He has established his benefit rights as an "insured worker." Conn. Gen. Stat. §§31-236 and 31-241; and any disputes concerning the reasons for the termination of his last employment or the extent of his prior earnings have been resolved in his favor. Conn. Gen. Stat. §31-274(c). *See,* Java, *supra,* 402 U.S. at 125-29. He has been found eligible to receive a set amount of benefits for a fixed number of weeks. *See,* Conn. Gen. Stat. §31-241. In short, following an initial determination of eligibility, the unemployed worker occupies a new position, entirely different from a worker whose

entitlement to benefits has never been established. Indeed, as the deposition of a veteran unemployment department employee indicates, the claimant in a "continued claim status" is not checked when he receives his payments every week, but rather it is done on a very random basis determined by the press of claims presented and the availability of workers to interview the claimant. (A. - 94a-96a).[97]

Therefore, although it is necessary for the recipient to "report to the local office to continue his claim," no new initial redetermination of eligibility occurs. The recipient merely goes to the unemployment office each week, signs a benefit voucher and then is given his check. Personal interviews occur not every week, nor bi-weekly, but only at random intervals depending on the availability of a line examiner on the issue of continued eligibility.[98]

If his continued eligibility is challenged by the department, it is unlikely that benefits will be withheld only for a particular week. Rather, depending upon the Department's purported justification for the suspension or termination, his benefits may be discontinued for what the department terms a "penalty period" of

[97]The Department has recently abolished (April 4, 1974) its random redetermination of eligibility for claimants in the "continued claim" status, so that periodic reinterviews of claimants in "continued claims" status is no longer mandatory. In pertinent part, this memorandum to all office managers states: "Effective immediately the *periodic reinterviews* conducted by the Unemployment Compensation Department are to be discontinued . . . All claimants are to be interviewed by the Employment Service at least once a month to expose claimants to Job Bank Listings . . ."

[98]See, Smarz's deposition, (A. - 57a, 58a, 59a and A. - 131a).

several weeks. Conn. Gen. Stat. §31-236.[99] The Department in fact employs a standard of presumptive ineligibility for those claimants who are found not available for work, (A. - 41a Affidavit of Juan Miranda).

In appellee Miranda's case, for example, the erroneous termination of benefits was for an indefinite period. In appellee Paskewitz's case, the termination of benefits was also for an indefinite period. In appellee Triana's case, the termination was for a period of five weeks with the added unjustified penalty that all benefits to be paid would be held pending the determination by the commissioner on her appeal.[100]

Although the court below felt constrained from ruling on the statutory claim presented herein, appellees maintain that, benefits are not "due each week, but rather are continuously 'due' continued claims "recipients throughout their fixed period of eligibility unless they have been found on the basis of a full evidentiary hearing to have violated full department regulations and memoranda." Indeed, the district court in *Burney* so found when it stated:

> . . . the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due

[99]Various subsections of Conn. Gen. Stat. §31-236 outline varying periods of disqualification which continue for periods more than the one week new determination, that the Department purports to be the standard of use in determining eligibility in Connecticut.

[100] See statement and admission of Department that this practice violates Department policy, yet is found to be in effect in many of the larger unemployment offices throughout the State of Connecticut. (A. 39a, Stipulation No. 15).

process hearing has been held with regard to a subsequent finding of eligibility . . . .

The court thus finds that the Plaintiff Burney's benefits were "due" and could not be summarily suspended due to the deputy's determination of ineligibility under Section 2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], Plaintiff Burney was entitled to benefits until defendant afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under Section 303(a)(1) of the Social Security Act. [*See*, Java, *supra*, 402 U.S. at 133-35, Burney, *supra*, 347 F.Supp. 218, 223 (N.D. Ind., 1971)].

To accomplish the objectives of the Social Security Act, Congress intended that continued claim recipients, no less than the initial recipients before the Court in *Java*, be afforded timely payment of unemployment compensation. Only an evidentiary hearing prior to a proposed termination of benefits can achieve this goal, and insure eligible recipients, "full payment of unemployment compensation when due." 42 U.S.C. Section 503 (a)(1). The seated interview presently utilized by the Department does not provide for "payment when due" but constitutes a sham and a direct affront to the laudible purpose and congressional intent of the Social Security Act of 1935.

B. By Delaying An Evidentiary Hearing Until Several Months After The Suspension Of Benefits, The Department Violates The "Fair Hearing" Requirement Of The Social Security Act.

The Social Security Act requires that the Department afford a "fair hearing" to unemployment compensation

recipients whose benefits are suspended. 42 U.S.C. Section 503 (a)(3). This statutory "fair hearing" must comport with due process requirements. As this Court stated in *Shields v. Utah-Idaho Central Railway Co.*, 305 U.S. 177, 182 (1938), the "manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of the administrative body are entitled to insist."[101]

It is uncontested that the "fair hearing" required by the Social Security Act must be a full evidentiary hearing.[102] It must also be a prior hearing. In interpreting other statutory "fair hearing" requirements, this Court has recognized that in many instances a statute only satisfies due process if the hearing is provided prior to the deprivation of property. In *United States v. Illinois Central Railroad Co.*, 291 U.S. 457

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[101] *See also, Philadelphia Co. v. Securities and Exchange Commission*, 175 F.2d, 808, 817 (D.C. Cir., 1948), *vacated as moot*, 337 U.S. 901 (1949).

[102] In describing the elements that should be included in an unemployment compensation "fair hearing," the United States Department of Labor has specified the same procedural protections outlined by this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> Hearings must be fair and they must therefore be conducted in accordance with the procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been exerpted from case law: "Timely notice to all claimants of every material step in the proceeding; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross examine witnesses; . . . and the decision of the board shall be governed and based upon the evidence produced at the hearing . . ."
>
> U.S. Department of Labor, Unemployment Insurance Services, Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Rules and Procedures, 2-3 (1970).

(1934), for example, an administrative rate making procedure for railway freight charges lacking a prior hearing was challenged on both statutory and constitutional grounds. The court found that a prior hearing was required under the statute's fair hearing provision.[103] Having so ruled, the court concluded that the statute satisfied due process requirements. Likewise, for the unemployment compensation statutory scheme to meet constitutional standards,[104] the "fair hearing" required by the Social Security Act must be a prior hearing and it must be prompt.

Further, to assure fulfillment of the statutory purposes of the unemployment compensation program, only a hearing held before benefits are suspended meets the Act's "fair hearing" requirement. Only a prior hearing assures the regular flow of benefits to eligible workers – which "is what the unemployment insurance program was all about." Java, *supra*, 402 U.S. at 135. Any other procedure denies benefits during the critical period in which the Department recognizes unemployment compensation must be paid.

The Department urged in the District Court that the post termination commissioner's hearing fulfills its due process and fair hearing obligation under the Act, (Brief of Appellant at 19-20, in District Court). On appeal, however, they have wisely abandoned that position. By delaying this evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, the Department fails to provide a "fair hearing" at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients

[103] See also, Greene v. McElroy, 360 U.S. 474 (1959)

[104] See, Section II of this brief, *infra*

are thereby deprived of an "early substitute compensation during unemployment." Java, *supra*, 402 U.S. at 133. The Department's failure to provide a pre-termination evidentiary hearing directly contravenes the congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare, (2) helping workers in their search for new employment, and (3) maintaining the purchasing power of the unemployed throughout the continuous payment of benefits, and thus violates the Social Security Act's "fair hearing" requirement. 42 U.S.C. Section 503(a)(3).

CONCLUSION

For the reasons that Connecticut's "seated interview" system for terminating or suspending unemployment compensation benefits violates the Due Process Clause of the Fourteenth Amendment and the "when due"

and "fair hearing" requirements of the Social Security Act, the judgment below should be affirmed.

Respectfully submitted,

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